UNITED STATES REPORTS

VOLUME 465

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1983

JANUARY 23 THROUGH MARCH 23, 1984

TOGETHER WITH OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

HENRY C. LIND

REPORTER OF DECISIONS

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V. 465

ERRATUM

462 U. S. 959, line 15: "govermental" should be "governmental".

GL Stacks
Depos U.S.A
2-10-87

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.
SANDRA DAY O'CONNOR, Associate Justice.

RETIRED

POTTER STEWART, Associate Justice.

OFFICERS OF THE COURT

WILLIAM FRENCH SMITH, Attorney General.
REX E. LEE, Solicitor General.
ALEXANDER L. STEVAS, Clerk.
HENRY C. LIND, Reporter of Decisions.
ALFRED WONG, Marshal.
ROGER F. JACOBS, Librarian.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective *nunc pro tunc* October 1, 1981, *viz.:*

For the District of Columbia Circuit, **WARREN E. BURGER**, Chief Justice.

For the First Circuit, **WILLIAM J. BRENNAN, JR.**, Associate Justice.

For the Second Circuit, **THURGOOD MARSHALL**, Associate Justice.

For the Third Circuit, **WILLIAM J. BRENNAN, JR.**, Associate Justice.

For the Fourth Circuit, **WARREN E. BURGER**, Chief Justice.

For the Fifth Circuit, **BYRON R. WHITE**, Associate Justice.

For the Sixth Circuit, **SANDRA DAY O'CONNOR**, Associate Justice.

For the Seventh Circuit, **JOHN PAUL STEVENS**, Associate Justice.

For the Eighth Circuit, **HARRY A. BLACKMUN**, Associate Justice.

For the Ninth Circuit, **WILLIAM H. REHNQUIST**, Associate Justice.

For the Tenth Circuit, **BYRON R. WHITE**, Associate Justice.

For the Eleventh Circuit, **LEWIS F. POWELL, JR.**, Associate Justice.

October 5, 1981.

Pursuant to the provisions of Title 28, United States Code, Section 42, *It is ordered* that the CHIEF JUSTICE be, and he hereby is, assigned to the Federal Circuit as Circuit Justice, effective October 1, 1982.

October 12, 1982.

(For next previous allotment, see 423 U. S., p. VI.)

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[illegible]

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1983

SOUTHLAND CORP. ET AL. *v.* KEATING ET AL.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA

No. 82–500. Argued October 4, 1983—Decided January 23, 1984

Appellant Southland Corp. (hereafter appellant) is the owner and franchisor of 7–Eleven convenience stores. Appellees are 7–Eleven franchisees. Each franchise agreement between appellant and appellees contains a clause requiring arbitration of any controversy or claim arising out of or relating to the agreement or breach thereof. Several of the appellees filed individual actions against appellant in California Superior Court, alleging fraud, misrepresentation, breach of contract, breach of fiduciary duty, and violation of the disclosure requirements of the California Franchise Investment Law. These actions were consolidated with a subsequent class action filed by another appellee making substantially the same claims. Appellant moved to compel arbitration of the claims pursuant to the contract. The Superior Court granted the motion as to all claims except those based on the Franchise Investment Law, and did not pass on appellees' request for class certification. The California Court of Appeal reversed the trial court's refusal to compel arbitration of the claims under the Franchise Investment Law, construing the arbitration clause to require arbitration of such claims and holding that the Franchise Investment Law did not invalidate arbitration agreements and that if it rendered such agreements involving commerce unenforceable, it would conflict with § 2 of the United States Arbitration Act, which provides that "a contract evidencing a transaction involving commerce to settle by arbitration a controversy . . . arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." The court also directed the trial court to conduct class-certification proceedings. The California Supreme Court reversed the ruling that claims asserted under the Franchise Investment Law are arbitrable, interpreting § 31512 of that Law—which renders void any provision purporting to bind a franchisee to waive compliance with any provision of that Law—to require judicial consideration of claims brought under that statute and holding that the statute did not contravene the federal Act. The court remanded the case to the trial court for consideration of appellees' request for class certification.

Held:

1. This Court has jurisdiction under 28 U. S. C. § 1257(2) to decide whether the United States Arbitration Act pre-empts § 31512 of the California statute. *Cox Broadcasting Corp.* v. *Cohn,* 420 U. S. 469. To delay review of a state judicial decision denying enforcement of an arbitration contract until the state litigation has run its course would defeat the core purpose of the contract. On the other hand, since it does not affirmatively appear that the request for class certification was "drawn in question" *on federal grounds,* this Court is without jurisdiction to resolve this question as a matter of federal law under § 1257(2). Pp. 6–9.

2. Section 31512 of the California statute directly conflicts with § 2 of the United States Arbitration Act and hence violates the Supremacy Clause. Pp. 10–16.

(a) In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims that the contracting parties agreed to resolve by arbitration. That Act, resting on Congress' authority under the Commerce Clause, creates a body of federal substantive law that is applicable in both state and federal courts. *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.,* 460 U. S. 1. To confine the Act's scope to arbitrations sought to be enforced in federal courts would frustrate what Congress intended to be a broad enactment. Pp. 10–14.

(b) If Congress, in enacting the Arbitration Act, had intended to create a procedural rule applicable only in federal courts it would not have limited the Act to contracts "involving commerce." Section 2's "involving commerce" requirement is not to be viewed as an inexplicable limitation on the power of the federal courts but as a necessary qualification on a statute intended to apply in state as well as federal courts. Pp. 14–15.

(c) The California Supreme Court's interpretation of § 31512 would encourage and reward forum shopping. This Court will not attribute to

Congress the intent to create a right to enforce an arbitration contract and yet make that right dependent on the particular forum in which it is asserted. Since the overwhelming proportion of civil litigation in this country is in the state courts, Congress could not have intended to limit the Arbitration Act to disputes subject only to *federal*-court jurisdiction. In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements. Pp. 15–16.

Appeal dismissed in part; 31 Cal. 3d 584, 645 P. 2d 1192, reversed in part and remanded.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. STEVENS, J., filed an opinion concurring in part and dissenting in part, *post*, p. 17. O'CONNOR, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 21.

Mark J. Spooner argued the case for appellants. With him on the briefs were *Peter K. Bleakley* and *Martin H. Kresse*.

John F. Wells argued the cause for appellees. With him on the brief were *Lise A. Pearlman* and *Fonda Karelitz*.*

CHIEF JUSTICE BURGER delivered the opinion of the Court.

This case presents the questions (a) whether the California Franchise Investment Law, which invalidates certain arbitration agreements covered by the Federal Arbitration Act, violates the Supremacy Clause and (b) whether arbitration under the federal Act is impaired when a class-action structure is imposed on the process by the state courts.

I

Appellant Southland Corp. is the owner and franchisor of 7–Eleven convenience stores. Southland's standard franchise agreement provides each franchisee with a license to use certain registered trademarks, a lease or sublease of a convenience store owned or leased by Southland, inventory

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*A brief of *amici curiae* was filed by *Simon H. Trevas* for the Securities Division of the State of Washington et al.

financing, and assistance in advertising and merchandising. The franchisees operate the stores, supply bookkeeping data, and pay Southland a fixed percentage of gross profits. The franchise agreement also contains the following provision requiring arbitration:

> "Any controversy or claim arising out of or relating to this Agreement or the breach hereof shall be settled by arbitration in accordance with the Rules of the American Arbitration Association . . . and judgment upon any award rendered by the arbitrator may be entered in any court having jurisdiction thereof."

Appellees are 7-Eleven franchisees. Between September 1975 and January 1977, several appellees filed individual actions against Southland in California Superior Court alleging, among other things, fraud, oral misrepresentation, breach of contract, breach of fiduciary duty, and violation of the disclosure requirements of the California Franchise Investment Law, Cal. Corp. Code Ann. § 31000 *et seq.* (West 1977). Southland's answer, in all but one of the individual actions, included the affirmative defense of failure to arbitrate.

In May 1977, appellee Keating filed a class action against Southland on behalf of a class that assertedly includes approximately 800 California franchisees. Keating's principal claims were substantially the same as those asserted by the other franchisees. After the various actions were consolidated, Southland petitioned to compel arbitration of the claims in all cases, and appellees moved for class certification.

The Superior Court granted Southland's motion to compel arbitration of all claims except those claims based on the Franchise Investment Law. The court did not pass on appellees' request for class certification. Southland appealed from the order insofar as it excluded from arbitration the claims based on the California statute. Appellees filed a petition for a writ of mandamus or prohibition in the California Court of Appeal arguing that the arbitration should proceed as a class action.

The California Court of Appeal reversed the trial court's refusal to compel arbitration of appellees' claims under the Franchise Investment Law. *Keating* v. *Superior Court, Alameda County,* 167 Cal. Rptr. 481 (1980). That court interpreted the arbitration clause to require arbitration of all claims asserted under the Franchise Investment Law, and construed the Franchise Investment Law not to invalidate such agreements to arbitrate.[1] Alternatively, the court concluded that if the Franchise Investment Law rendered arbitration agreements involving commerce unenforceable, it would conflict with §2 of the Federal Arbitration Act, 9 U. S. C. §2, and therefore be invalid under the Supremacy Clause. 167 Cal. Rptr., at 493–494. The Court of Appeal also determined that there was no "insurmountable obstacle" to conducting an arbitration on a classwide basis, and issued a writ of mandate directing the trial court to conduct class-certification proceedings. *Id.*, at 492.

The California Supreme Court, by a vote of 4–2, reversed the ruling that claims asserted under the Franchise Investment Law are arbitrable. *Keating* v. *Superior Court of Alameda County,* 31 Cal. 3d 584, 645 P. 2d 1192 (1982). The California Supreme Court interpreted the Franchise Investment Law to require judicial consideration of claims brought under that statute and concluded that the California statute did not contravene the federal Act. *Id.*, at 604, 645 P. 2d, 1203–1204. The court also remanded the case to the trial court for consideration of appellees' request for classwide arbitration.

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[1] California Corp. Code Ann. §31512 (West 1977) provides: "Any condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule or order hereunder is void."

We postponed consideration of the question of jurisdiction pending argument on the merits. 459 U. S. 1101 (1983). We reverse in part and dismiss in part.

II

A

Jurisdiction of this Court is asserted under 28 U. S. C. § 1257(2), which provides for an appeal from a final judgment of the highest court of a state when the validity of a challenged state statute is sustained as not in conflict with federal law. Here Southland challenged the California Franchise Investment Law as it was applied to invalidate a contract for arbitration made pursuant to the Federal Arbitration Act. Appellees argue that the action of the California Supreme Court with respect to this claim is not a "final judgment or decree" within the meaning of § 1257(2).

Under *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 482–483 (1975), judgments of state courts that finally decide a federal issue are immediately appealable when "the party seeking review here might prevail [in the state court] on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action . . . ." In these circumstances, we have resolved the federal issue "if a refusal immediately to review the state-court decision might seriously erode federal policy." *Id.*, at 483.

The judgment of the California Supreme Court with respect to this claim is reviewable under *Cox Broadcasting*, *supra*. Without immediate review of the California holding by this Court there may be no opportunity to pass on the federal issue and as a result "there would remain in effect the unreviewed decision of the State Supreme Court" holding that the California statute does not conflict with the Federal Arbitration Act. *Id.*, at 485. On the other hand, reversal of a state-court judgment in this setting will terminate litigation of the merits of this dispute.

Finally, the failure to accord immediate review of the decision of the California Supreme Court might "seriously erode federal policy." Plainly the effect of the judgment of the California court is to nullify a valid contract made by private parties under which they agreed to submit all contract disputes to final, binding arbitration. The federal Act permits "parties to an arbitrable dispute [to move] out of court and into arbitration as quickly and easily as possible." *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U. S. 1, 22 (1983).

Contracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts. Such a course could lead to prolonged litigation, one of the very risks the parties, by contracting for arbitration, sought to eliminate. In *The Bremen* v. *Zapata Off-Shore Co.*, 407 U. S. 1, 12 (1972), we noted that the contract fixing a particular forum for resolution of all disputes

> "was made in an arm's-length negotiation by experienced and sophisticated businessmen, and absent some compelling and countervailing reason it should be honored by the parties and enforced by the courts."

The *Zapata* Court also noted that

> "the forum clause was a vital part of the agreement, and it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum clause figuring prominently in their calculations." *Id.*, at 14 (footnote omitted).

For us to delay review of a state judicial decision denying enforcement of the contract to arbitrate until the state-court litigation has run its course would defeat the core purpose of a contract to arbitrate. We hold that the Court has jurisdiction to decide whether the Federal Arbitration Act pre-empts § 31512 of the California Franchise Investment Law.

B

That part of the appeal relating to the propriety of superimposing class-action procedures on a contract arbitration raises other questions. Southland did not contend in the California courts that, and the state courts did not decide whether, state law imposing class-action procedures was pre-empted by federal law. When the California Court of Appeal directed Southland to address the question whether state or federal law controlled the class-action issue, Southland responded that *state law* did not permit arbitrations to proceed as class actions, that the Federal Rules of Civil Procedure were inapplicable, and that requiring arbitrations to proceed as class actions "could well violate the [federal] constitutional guaranty of procedural due process."[2] Southland did not claim in the Court of Appeal that if state law required class-action procedures, it would conflict with the federal Act and thus violate the Supremacy Clause.

In the California Supreme Court, Southland argued that California law applied but that neither the contract to arbitrate nor state law authorized class-action procedures to govern arbitrations. Southland also contended that the Federal Rules were inapplicable in state proceedings. Southland pointed out that although California law provided a basis for class-action procedures, the Judicial Council of California acknowledged "the incompatibility of class actions and arbitration." Petition for Hearing 23. It does not appear that Southland opposed class procedures on *federal* grounds in the

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[2] Supplemental Memorandum of Points and Authorities in Opposition to Petition for Writs of Mandate or Prohibition in Civ. No. 45162 (Ct. App. Cal., 1st App. Dist.), pp. 19–25.

California Supreme Court.[3] Nor does the record show that the California Supreme Court passed upon the question whether superimposing class-action procedures on a contract arbitration was contrary to the federal Act.[4]

Since it does not affirmatively appear that the validity of the state statute was "drawn in question" *on federal grounds* by Southland, this Court is without jurisdiction to resolve this question as a matter of federal law under 28 U. S. C. § 1257(2). See *Bailey* v. *Anderson*, 326 U. S. 203, 207 (1945).

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[3] The question Southland presented to the State Supreme Court was "[w]hether a court may enter an order compelling a private commercial arbitration governed by the Federal Arbitration Act . . . to proceed as a class action even though the terms of the parties' arbitration agreement do not provide for such a procedure." Petition for Hearing in Civ. No. 45162 (Cal. 1980). Southland argued that (1) the decision of the Court of Appeal "is in conflict with the decisions of other Courts of Appeal in this State," *id.*, at 3; (2) class actions would delay and complicate arbitration, increase its cost, and require judicial supervision, "considerations [which] strongly militate against the creation of class action arbitration procedures," *id.*, at 22; and (3) there was no basis in law for class actions. According to appellants, the Federal Rules of Civil Procedure did not apply in California courts. *Id.*, at 23. Southland thus relied, not on federal law, but on California law in opposing class-action procedures.

[4] The California Supreme Court cited "[a]nalogous authority" supporting consolidation of arbitration proceedings by federal courts. 31 Cal. 3d, at 611–612, 645 P. 2d, at 1208. *E. g., Compania Espanola de Petroleos, S. A.* v. *Nereus Shipping, S. A.*, 527 F. 2d 966, 975 (CA2 1975), cert. denied, 426 U. S. 936 (1976); *In re Czarnikow-Rionda Co.*, 512 F. Supp. 1308, 1309 (SDNY 1981). This, along with support by other state courts and the California Legislature for consolidation of arbitration proceedings, permitted the court to conclude that class-action proceedings were authorized: "It is unlikely that the state Legislature in adopting the amendment to the Arbitration Act authorizing consolidation of arbitration proceedings, intended to preclude a court from ordering classwide arbitration in an appropriate case. We conclude that a court is not without authority to do so." 31 Cal. 3d, at 613, 645 P. 2d, at 1209. The California Supreme Court thus ruled that imposing a class-action structure on the arbitration process was permissible as a matter of state law.

III

As previously noted, the California Franchise Investment Law provides:

> "Any condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule or order hereunder is void." Cal. Corp. Code Ann. § 31512 (West 1977).

The California Supreme Court interpreted this statute to require judicial consideration of claims brought under the state statute and accordingly refused to enforce the parties' contract to arbitrate such claims. So interpreted the California Franchise Investment Law directly conflicts with § 2 of the Federal Arbitration Act and violates the Supremacy Clause.

In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration. The Federal Arbitration Act provides:

> "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U. S. C. § 2.

Congress has thus mandated the enforcement of arbitration agreements.

We discern only two limitations on the enforceability of arbitration provisions governed by the Federal Arbitration

Act: they must be part of a written maritime contract or a contract "evidencing a transaction involving commerce"[5] and such clauses may be revoked upon "grounds as exist at law or in equity for the revocation of any contract." We see nothing in the Act indicating that the broad principle of enforceability is subject to any additional limitations under state law.

The Federal Arbitration Act rests on the authority of Congress to enact substantive rules under the Commerce Clause. In *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U. S. 395 (1967), the Court examined the legislative history of the Act and concluded that the statute "is based upon . . . the incontestable federal foundations of 'control over interstate commerce and over admiralty.'" *Id.*, at 405 (quoting H. R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924)). The contract in *Prima Paint,* as here, contained an arbitration clause. One party in that case alleged that the other had committed fraud in the inducement of the contract, although not of the arbitration clause in particular, and sought to have the claim of fraud adjudicated in federal court. The Court held that, notwithstanding a contrary state rule, consideration of a claim of fraud in the inducement of a contract "is for the arbitrators and not for the courts," 388 U. S., at 400. The Court relied for this holding on Congress' broad power to fashion substantive rules under the Commerce Clause.[6]

At least since 1824 Congress' authority under the Commerce Clause has been held plenary. *Gibbons* v. *Ogden*, 9 Wheat. 1, 196 (1824). In the words of Chief Justice Marshall, the authority of Congress is "the power to regulate; that is, to prescribe the rule by which commerce is to be governed." *Ibid.* The statements of the Court in *Prima Paint* that the Arbitration Act was an exercise of the Commerce Clause power clearly implied that the substantive rules of the Act were to apply in state as well as federal courts. As Justice Black observed in his dissent, when Congress exercises its authority to enact substantive federal law under the Commerce Clause, it normally creates rules that are enforceable in state as well as federal courts. *Prima Paint, supra,* at 420.

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[5] We note that in defining "commerce" Congress declared that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U. S. C. § 1.

[6] The procedures to be used in an arbitration are not prescribed by the federal Act. We note, however, that *Prima Paint* considered the question of what issues are for the courts and what issues are for the arbitrator.

In *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U. S., at 1, 25, and n. 32, we reaffirmed our view that the Arbitration Act "creates a body of federal substantive law" and expressly stated what was implicit in *Prima Paint, i. e.*, the substantive law the Act created was applicable in state and federal courts. *Moses H. Cone* began with a petition for an order to compel arbitration. The District Court stayed the action pending resolution of a concurrent state-court suit. In holding that the District Court had abused its discretion, we found no showing of exceptional circumstances justifying the stay and recognized "the presence of federal-law issues" under the federal Act as "a major consideration weighing against surrender [of federal jurisdiction]." 460 U. S., at 26. We thus read the underlying issue of arbitrability to be a question of substantive federal law: "Federal law in the terms of the Arbitration Act governs that issue in either state or federal court." *Id.*, at 24.

Although the legislative history is not without ambiguities, there are strong indications that Congress had in mind something more than making arbitration agreements enforceable only in the federal courts. The House Report plainly suggests the more comprehensive objectives:

> "The purpose of this bill is to make valid and enforcible *[sic]* agreements for arbitration contained *in contracts involv-*

> *ing interstate commerce* or within the jurisdiction or *[sic]* admiralty, *or* which may be the subject of litigation in the Federal courts." H. R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924) (emphasis added).

This broader purpose can also be inferred from the reality that Congress would be less likely to address a problem whose impact was confined to federal courts than a problem of large significance in the field of commerce. The Arbitration Act sought to "overcome the rule of equity, that equity will not specifically enforce an[y] arbitration agreement." Hearing on S. 4213 and S. 4214 before a Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 6 (1923) (Senate Hearing) (remarks of Sen. Walsh). The House Report accompanying the bill stated:

> "The need for the law arises from . . . the jealousy of the English courts for their own jurisdiction. . . . This jealousy survived for so lon[g] a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment . . . ." H. R. Rep. No. 96, *supra*, at 1–2.

Surely this makes clear that the House Report contemplated a broad reach of the Act, unencumbered by state-law constraints. As was stated in *Metro Industrial Painting Corp.* v. *Terminal Construction Co.*, 287 F. 2d 382, 387 (CA2 1961) (Lumbard, C. J., concurring), "the purpose of the act was to assure those who desired arbitration and whose contracts related to interstate commerce that their expectations would not be undermined by federal judges, or . . . by state courts or legislatures." Congress also showed its awareness of the widespread unwillingness of state courts to enforce arbitration agreements, *e. g.*, Senate Hearing, at 8, and that such courts were bound by state laws inadequately providing for

> "technical arbitration by which, if you agree to arbitrate under the method provided by the statute, you have an arbitration by statute[;] but [the statutes] ha[d] nothing to do with validating the contract to arbitrate." *Ibid.*

The problems Congress faced were therefore twofold: the old common-law hostility toward arbitration, and the failure of state arbitration statutes to mandate enforcement of arbitration agreements. To confine the scope of the Act to arbitrations sought to be enforced in federal courts would frustrate what we believe Congress intended to be a broad enactment appropriate in scope to meet the large problems Congress was addressing.

JUSTICE O'CONNOR argues that Congress viewed the Arbitration Act "as a procedural statute, applicable only in federal courts." *Post*, at 25. If it is correct that Congress sought only to create a procedural remedy in the federal courts, there can be no explanation for the express limitation in the Arbitration Act to contracts "involving commerce." 9 U. S. C. §2. For example, when Congress has authorized this Court to prescribe the rules of procedure in the federal courts of appeals, district courts, and bankruptcy courts, it has not limited the power of the Court to prescribe rules applicable only to causes of action involving commerce. See, *e. g.*, 28 U. S. C. §§2072, 2075, 2076 (1976 ed. and Supp. V). We would expect that if Congress, in enacting the Arbitration Act, was creating what it thought to be a procedural rule applicable only in federal courts, it would not so limit the Act to transactions involving commerce. On the other hand, Congress would need to call on the Commerce Clause if it intended the Act to apply in state courts. Yet at the same time, its reach would be limited to transactions involving interstate commerce. We therefore view the "involving commerce" requirement in §2, not as an inexplicable limitation on the power of the federal courts, but as a necessary qualification on a statute intended to apply in state and federal courts.

Under the interpretation of the Arbitration Act urged by JUSTICE O'CONNOR, claims brought under the California Franchise Investment Law are not arbitrable when they are raised in state court. Yet it is clear beyond question that if this suit had been brought as a diversity action in a federal district court, the arbitration clause would have been enforceable.[7] *Prima Paint, supra.* The interpretation given to the Arbitration Act by the California Supreme Court would therefore encourage and reward forum shopping. We are unwilling to attribute to Congress the intent, in drawing on the comprehensive powers of the Commerce Clause, to create a right to enforce an arbitration contract and yet make the right dependent for its enforcement on the particular forum in which it is asserted. And since the overwhelming proportion of all civil litigation in this country is in the state courts,[8] we cannot believe Congress intended to limit the Arbitration Act to disputes subject only to *federal*-court jurisdiction.[9] Such an interpretation would frustrate congressional intent to place "[a]n arbitration agreement . . . upon the same footing as other contracts, where it belongs." H. R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924).

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[7] Appellees contend that the arbitration clause, which provides for the arbitration of "any controversy or claim arising out of or relating to this Agreement or the breach hereof," does not cover their claims under the California Franchise Investment Law. We find the language quoted above broad enough to cover such claims. Cf. *Prima Paint*, 388 U. S., at 403–404, 406 (finding nearly identical language to cover a claim that a contract was induced by fraud).

[8] It is estimated that 2% of all civil litigation in this country is in the federal courts. Annual Report of the Director of the Administrative Office of the U. S. Courts 3 (1982) (206,000 filings in federal district courts in 12 months ending June 30, 1982, excluding bankruptcy filings); Flango & Elsner, Advance Report, The Latest State Court Caseload Data, 7 State Court J., 18 (Winter 1983) (approximately 13,600,000 civil filings during comparable period, excluding traffic filings).

[9] While the Federal Arbitration Act creates federal substantive law requiring the parties to honor arbitration agreements, it does not create any independent federal-question jurisdiction under 28 U. S. C. § 1331 or otherwise. *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U. S. 1, 25, n. 32 (1983). This seems implicit in the provisions in

In creating a substantive rule applicable in state as well as federal courts,[10] Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.[11] We hold that § 31512 of the California Franchise Investment Law violates the Supremacy Clause.

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§ 3 for a stay by a "court in which such suit is pending" and in § 4 that enforcement may be ordered by "any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties." *Ibid.; Prima Paint, supra*, at 420, and n. 24 (Black, J., dissenting); *Krauss Bros. Lumber Co.* v. *Louis Bossert & Sons, Inc.*, 62 F. 2d 1004, 1006 (CA2 1933) (L. Hand, J.).

[10] The contention is made that the Court's interpretation of § 2 of the Act renders §§ 3 and 4 "largely superfluous." *Post*, at 31, n. 20. This misreads our holding and the Act. In holding that the Arbitration Act preempts a state law that withdraws the power to enforce arbitration agreements, we do not hold that §§ 3 and 4 of the Arbitration Act apply to proceedings in state courts. Section 4, for example, provides that the Federal Rules of Civil Procedure apply in proceedings to compel arbitration. The Federal Rules do not apply in such state-court proceedings.

[11] The California Supreme Court justified its holding by reference to our conclusion in *Wilko* v. *Swan*, 346 U. S. 427 (1953), that arbitration agreements are nonbinding as to claims arising under the federal Securities Act of 1933. 31 Cal. 3d, at 602, 645 P. 2d, at 1202–1203. The analogy is unpersuasive. The question in *Wilko* was not whether a state legislature could create an exception to § 2 of the Arbitration Act, but rather whether Congress, in subsequently enacting the Securities Act, had in fact created such an exception.

JUSTICE STEVENS dissents in part on the ground that § 2 of the Arbitration Act permits a party to nullify an agreement to arbitrate on "such grounds as exist at law or in equity for the revocation of any contract." *Post*, at 19. We agree, of course, that a party may assert general contract defenses such as fraud to avoid enforcement of an arbitration agreement. We conclude, however, that the defense to arbitration found in the California Franchise Investment Law is not a ground that exists at law or in equity "for the revocation of *any* contract" but merely a ground that exists for the revocation of arbitration provisions in contracts subject to the California Franchise Investment Law. Moreover, under this dissenting view,

IV

The judgment of the California Supreme Court denying enforcement of the arbitration agreement is reversed; as to the question whether the Federal Arbitration Act precludes a class-action arbitration and any other issues not raised in the California courts, no decision by this Court would be appropriate at this time. As to the latter issues, the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE STEVENS, concurring in part and dissenting in part.

The Court holds that an arbitration clause that is enforceable in an action in a federal court is equally enforceable if the action is brought in a state court. I agree with that conclusion. Although JUSTICE O'CONNOR's review of the legislative history of the Federal Arbitration Act demonstrates that the 1925 Congress that enacted the statute viewed the statute as essentially procedural in nature, I am persuaded that the intervening developments in the law compel the conclusion that the Court has reached. I am nevertheless troubled by one aspect of the case that seems to trouble none of my colleagues.

For me it is not "clear beyond question that if this suit had been brought as a diversity action in a federal district court, the arbitration clause would have been enforceable." *Ante*, at 15. The general rule prescribed by §2 of the Federal

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"a state policy of providing special protection for franchisees . . . can be recognized without impairing the basic purposes of the federal statute." *Post*, at 21. If we accepted this analysis, states could wholly eviscerate congressional intent to place arbitration agreements "upon the same footing as other contracts," H. R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924), simply by passing statutes such as the Franchise Investment Law. We have rejected this analysis because it is in conflict with the Arbitration Act and would permit states to override the declared policy requiring enforcement of arbitration agreements.

Arbitration Act is that arbitration clauses in contracts involving interstate transactions are enforceable as a matter of federal law. That general rule, however, is subject to an exception based on "such grounds as exist at law or in equity for the revocation of any contract." I believe that exception leaves room for the implementation of certain substantive state policies that would be undermined by enforcing certain categories of arbitration clauses.

The exercise of state authority in a field traditionally occupied by state law will not be deemed pre-empted by a federal statute unless that was the clear and manifest purpose of Congress. *Ray* v. *Atlantic Richfield Co.*, 435 U. S. 151, 157 (1978); see generally The Federalist No. 32, p. 200 (Van Doren ed. 1945) (A. Hamilton). Moreover, even where a federal statute does displace state authority, it "rarely occupies a legal field completely, totally excluding all participation by the legal systems of the states. . . . Federal legislation, on the whole, has been conceived and drafted on an *ad hoc* basis to accomplish limited objectives. It builds upon legal relationships established by the states, altering or supplanting them only so far as necessary for the special purpose." P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 470–471 (2d ed. 1973).

The limited objective of the Federal Arbitration Act was to abrogate the general common-law rule against specific enforcement of arbitration agreements, S. Rep. No. 536, 68th Cong., 1st Sess., 2–3 (1924), and a state statute which merely codified the general common-law rule—either directly by employing the prior doctrine of revocability or indirectly by declaring all such agreements void—would be pre-empted by the Act. However, beyond this conclusion, which seems compelled by the language of § 2 and case law concerning the Act, it is by no means clear that Congress intended entirely to displace state authority in this field. Indeed, while it is an understatement to say that "the legislative history of the . . . Act . . . reveals little awareness on the part of Congress that state law might be affected," it must surely be true that given the lack of a "clear mandate from Congress as to the extent to which state statutes and decisions are to be superseded, we must be cautious in construing the act lest we excessively encroach on the powers which Congressional policy, if not the Constitution, would reserve to the states." *Metro Industrial Painting Corp.* v. *Terminal Construction Co.*, 287 F. 2d 382, 386 (CA2 1961) (Lumbard, C. J., concurring).

The textual basis in the Act for avoiding such encroachment is the clause of § 2 which provides that arbitration agreements are subject to revocation on such grounds as exist at law or in equity for the revocation of any contract. The Act, however, does not define what grounds for revocation may be permissible, and hence it would appear that the judiciary must fashion the limitations as a matter of federal common law. Cf. *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448 (1957). In doing so, we must first recognize that as the "'saving clause' in § 2 indicates, the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U. S. 395, 404, n. 12 (1967); see also, H. R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924). The existence of a federal statute enunciating a substantive federal policy does not necessarily require the inexorable application of a uniform federal rule of decision notwithstanding the differing conditions which may exist in the several States and regardless of the decisions of the States to exert police powers as they deem best for the welfare of their citizens. Cf. *Wallis* v. *Pan American Petroleum Corp.*, 384 U. S. 63, 69 (1966); see generally *Wilson* v. *Omaha Indian Tribe*, 442 U. S. 653, 671–672 (1979); *United States* v. *Kimbell Foods, Inc.*, 440 U. S. 715 (1979); *Clearfield Trust Co.* v. *United States*, 318 U. S. 363 (1943). Indeed, the lower courts generally look to state law regarding questions of formation of the arbitration agreement under § 2, see, *e. g.*, *Comprehensive Merchandising Catalogs*, *Inc.* v. *Madison Sales Corp.*, 521 F. 2d 1210 (CA7 1975), which is entirely appropriate so long as the state rule does not conflict with the policy of § 2.

A contract which is deemed void is surely revocable at law or in equity, and the California Legislature has declared all conditions purporting to waive compliance with the protections of the Franchise Investment Law, including but not limited to arbitration provisions, void as a matter of public policy. Given the importance to the State of franchise relationships, the relative disparity in the bargaining positions between the franchisor and the franchisee, and the remedial purposes of the California Act, I believe this declaration of state policy is entitled to respect.

Congress itself struck a similar balance in § 14 of the Securities Act of 1933, 15 U. S. C. § 77n, and did not find it necessary to amend the Federal Arbitration Act. Rather, this Court held that the Securities Act provision invalidating arbitration agreements in certain contexts could be reconciled with the general policy favoring enforcement of arbitration agreements. *Wilko* v. *Swan*, 346 U. S. 427 (1953). Repeals by implication are of course not favored, and we did not suggest that Congress had intended to repeal or modify the substantive scope of the Arbitration Act in passing the Securities Act. Instead, we exercised judgment, scrutinizing the policies of the Arbitration Act and their applicability in the special context of the remedial legislation at issue, and found the Arbitration Act inapplicable. We have exercised such judgment in other cases concerning the scope of the Arbitration Act, and have focused not on sterile generalization, but rather on the substance of the transaction at issue, the nature of the relationship between the parties to the agreement, and the purpose of the regulatory scheme. See, *e. g.*, *Scherk* v. *Alberto-Culver Co.*, 417 U. S. 506 (1974), rev'g 484 F. 2d 611 (CA7 1973); see also, *id.*, at 615–620 (Stevens, Circuit Judge, dissenting). Surely the general language of the Arbitration Act that arbitration agreements are valid does not mean that all such agreements are valid irrespective of their purpose or effect. See generally *Paramount Famous Lasky Corp.* v. *United States*, 282 U. S. 30 (1930) (holding arbitration agreement void as a restraint of trade).

We should not refuse to exercise independent judgment concerning the conditions under which an arbitration agreement, generally enforceable under the Act, can be held invalid as contrary to public policy simply because the source of the substantive law to which the arbitration agreement attaches is a State rather than the Federal Government. I find no evidence that Congress intended such a double standard to apply, and I would not lightly impute such an intent to the 1925 Congress which enacted the Arbitration Act.

A state policy excluding wage claims from arbitration, cf. *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Ware*, 414 U. S. 117 (1973), or a state policy of providing special protection for franchisees, such as that expressed in California's Franchise Investment Law, can be recognized without impairing the basic purposes of the federal statute. Like the majority of the California Supreme Court, I am not persuaded that Congress intended the pre-emptive effect of this statute to be "so unyielding as to require enforcement of an agreement to arbitrate a dispute over the application of a regulatory statute which a state legislature, in conformity with analogous federal policy, has decided should be left to judicial enforcement." App. to Juris. Statement 18a.

Thus, although I agree with most of the Court's reasoning and specifically with its jurisdictional holdings, I respectfully dissent from its conclusion concerning the enforceability of the arbitration agreement. On that issue, I would affirm the judgment of the California Supreme Court.

JUSTICE O'CONNOR, with whom JUSTICE REHNQUIST joins, dissenting.

Section 2 of the Federal Arbitration Act (FAA) (also known as the United States Arbitration Act) provides that a written arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[1] Section 2 does not, on its face, identify which judicial forums are bound by its requirements or what procedures govern its enforcement. The FAA deals with these matters in §§ 3 and 4. Section 3 provides:

> "If any suit or proceeding be brought *in any of the courts of the United States* upon any issue referable to arbitration . . . the court . . . shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement . . . ."[2]

Section 4 specifies that a party aggrieved by another's refusal to arbitrate

> "may petition *any United States district court* which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter . . . for an order directing that such arbitration proceed in the manner provided for in such agreement. . . ."[3]

Today, the Court takes the facial silence of § 2 as a license to declare that state as well as federal courts must apply § 2. In addition, though this is not spelled out in the opinion, the Court holds that in enforcing this newly discovered federal right state courts must follow procedures specified in § 3. The Court's decision is impelled by an understandable desire to encourage the use of arbitration, but it utterly fails to recognize the clear congressional intent underlying the FAA. Congress intended to require federal, not state, courts to respect arbitration agreements.

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[1] 9 U. S. C. § 2.

[2] 9 U. S. C. § 3 (emphasis added).

[3] 9 U. S. C. § 4 (emphasis added). Section 9, which addresses the enforcement of arbitration awards, is also relevant. "If no court is specified in the agreement of the parties, then such application may be made to the *United States court in and for the district within which such award was made*. . . ." 9 U. S. C. § 9 (emphasis added).

I

The FAA was enacted in 1925. As demonstrated *infra,* at 24–29, Congress thought it was exercising its power to dictate either procedure or "general federal law" in federal courts. The issue presented here is the result of three subsequent decisions of this Court.

In 1938 this Court decided *Erie R. Co.* v. *Tompkins,* 304 U. S. 64. *Erie* denied the Federal Government the power to create substantive law solely by virtue of the Art. III power to control federal-court jurisdiction. Eighteen years later the Court decided *Bernhardt* v. *Polygraphic Co.,* 350 U. S. 198 (1956). *Bernhardt* held that the duty to arbitrate a contract dispute is outcome-determinative—*i. e.* "substantive"—and therefore a matter normally governed by state law in federal diversity cases.

Bernhardt gave rise to concern that the FAA could thereafter constitutionally be applied only in federal-court cases arising under federal law, not in diversity cases.[4] In *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.,* 388 U. S. 395, 404–405 (1967), we addressed that concern, and held that the FAA may constitutionally be applied to proceedings in a federal diversity court.[5] The FAA covers only contracts involving interstate commerce or maritime affairs, and Congress "plainly has power to legislate" in that area. *Id.,* at 405.

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[4] Justice Frankfurter made precisely this suggestion in *Bernhardt.* 350 U. S., at 208 (concurring opinion).

[5] Two Circuits had previously addressed the problem. *Robert Lawrence Co.* v. *Devonshire Fabrics, Inc.,* 271 F. 2d 402 (CA2 1959), cert. dism'd pursuant to stipulation of counsel, 364 U. S. 801 (1960); *American Airlines, Inc.* v. *Louisville & Jefferson County Air Bd.,* 269 F. 2d 811 (CA6 1959).

Nevertheless, the *Prima Paint* decision "carefully avoided any explicit endorsement of the view that the Arbitration Act embodied substantive policies that were to be applied to all contracts within its scope, whether sued on in state or federal courts." P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 731–732 (2d ed. 1973).[6] Today's case is the first in which this Court has had occasion to determine whether the FAA applies to state-court proceedings. One statement on the subject did appear in *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U. S. 1 (1983), but that case involved a federal, not a state, court proceeding; its dictum concerning the law applicable in state courts was wholly unnecessary to its holding.

II

The majority opinion decides three issues. First, it holds that §2 creates federal substantive rights that must be enforced by the state courts. Second, though the issue is not raised in this case, the Court states, *ante*, at 15–16, n. 9, that §2 substantive rights may not be the basis for invoking federal-court jurisdiction under 28 U. S. C. §1331. Third, the Court reads §2 to require state courts to enforce §2 rights using procedures that mimic those specified for federal courts by FAA §§3 and 4. The first of these conclusions is unquestionably wrong as a matter of statutory construction; the second appears to be an attempt to limit the damage done by the first; the third is unnecessary and unwise.

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[6] In *Robert Lawrence*, *supra*, the Second Circuit had flatly announced—in dictum, of course—that the FAA was "a declaration of national law equally applicable in state or federal courts." 271 F. 2d, at 407. One Justice in *Prima Paint* was prepared to adopt wholesale the Second Circuit's more broadly written opinion. 388 U. S., at 407 (Harlan, J., concurring). But the *Prima Paint* majority opinion did not do so. In these circumstances, the majority opinion speaks loudly by its complete silence regarding the Act's applicability to state courts.

A

One rarely finds a legislative history as unambiguous as the FAA's. That history establishes conclusively that the 1925 Congress viewed the FAA as a procedural statute, applicable only in federal courts, derived, Congress believed, largely from the federal power to control the jurisdiction of the federal courts.

In 1925 Congress emphatically believed arbitration to be a matter of "procedure." At hearings on the Act congressional Subcommittees were told: "The theory on which you do this is that you have the right to tell the Federal courts how to proceed."[7] The House Report on the FAA stated: "Whether an agreement for arbitration shall be enforced or not is a question of procedure . . . ."[8] On the floor of the House Congressman Graham assured his fellow Members that the FAA

> "does not involve any new principle of law except to provide a simple method . . . in order to give enforcement. . . . It creates no new legislation, grants no new rights, except a remedy to enforce an agreement in commercial contracts and in admiralty contracts."[9]

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[7] Arbitration of Interstate Commercial Disputes, Joint Hearings on S. 1005 and H. R. 646 before the Subcommittees of the Committees on the Judiciary, 68th Cong., 1st Sess., 17 (1924) (hereinafter Joint Hearings) (statement of Mr. Cohen, American Bar Association). See also Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration, Hearing on S. 4213 and S. 4214 before a Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 2 (1923) (hereinafter Senate Hearing).

[8] H. R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924). To similar effect, the Senate Report noted that the New York statute, after which the FAA was patterned, had been upheld against constitutional attack the previous year in *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109 (1924). S. Rep. No. 536, 68th Cong., 1st Sess., 3 (1924). In *Red Cross* Justice Brandeis based the Court's approval of the New York statute on the fact that the statute effected no change in the substantive law.

[9] 65 Cong. Rec. 1931 (1924).

A month after the Act was signed into law the American Bar Association Committee that had drafted and pressed for passage of the federal legislation wrote:

> "The statute establishes a procedure in the Federal courts for the enforcement of arbitration agreements. . . . A Federal statute providing for the enforcement of arbitration agreements does relate solely to procedure of the Federal courts. . . . [W]hether or not an arbitration agreement is to be enforced is a question of the law of procedure and is determined by the law of the jurisdiction wherein the remedy is sought. That the enforcement of arbitration contracts is within the law of procedure as distinguished from substantive law is well settled by the decisions of our courts."[10]

Since *Bernhardt*, a right to arbitration has been characterized as "substantive," and that holding is not challenged here. But Congress in 1925 did not characterize the FAA as this Court did in 1956. Congress *believed* that the FAA established nothing more than a rule of procedure, a rule therefore applicable only in the federal courts.[11]

If characterizing the FAA as procedural was not enough, the draftsmen of the Act, the House Report, and the early commentators all flatly stated that the Act was intended to affect only federal-court proceedings. Mr. Cohen, the American Bar Association member who drafted the bill, assured two congressional Subcommittees in joint hearings:

> "Nor can it be said that the Congress of the United States, *directing its own courts* . . . , would infringe upon

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[10] Committee on Commerce, Trade and Commercial Law, The United States Arbitration Law and Its Application, 11 A. B. A. J. 153, 154–155 (1925). See also Cohen & Dayton, The New Federal Arbitration Law, 12 Va. L. Rev. 265, 275–276 (1926).

[11] That Congress chose to apply the FAA only to proceedings related to commercial and maritime contracts does not suggest that the Act is "substantive." Cf. Fed. Rule Civ. Proc. 81; Fed. Rule Evid. 1101; Fed. Rule Crim. Proc. 54.

> the provinces or prerogatives of the States. . . . [T]he question of the enforcement relates to the law of remedies and not to substantive law. The rule must be changed for the jurisdiction in which the agreement is sought to be enforced . . . . There is no disposition therefore by means of the Federal bludgeon to force an individual State into an unwilling submission to arbitration enforcement."[12]

The House Report on the FAA unambiguously stated: "Before [arbitration] contracts could be enforced in the Federal courts . . . this law is essential. The bill declares that such agreements shall be recognized and enforced by the courts of the United States."[13]

Yet another indication that Congress did not intend the FAA to govern state-court proceedings is found in the powers Congress relied on in passing the Act. The FAA might have been grounded on Congress' powers to regulate interstate and maritime affairs, since the Act extends only to contracts in those areas. There are, indeed, references in the legislative history to the corresponding federal powers. More numerous, however, are the references to Congress' pre-*Erie* power to prescribe "general law" applicable in all federal courts.[14] At the congressional hearings, for example: "Congress rests solely upon its power to prescribe the jurisdiction and duties of the Federal courts."[15] And in the House Report:

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[12] Joint Hearings 39–40 (emphasis added). "The primary purpose of the statute is to make enforcible *[sic]* in the Federal courts such agreements for arbitration. . . ." *Id.*, at 38 (statement of Mr. Cohen). See also Senate Hearing 2 ("This bill follows the lines of the New York arbitration law, applying it to the fields wherein there is Federal jurisdiction").

[13] H. R. Rep. No. 96, *supra*, at 1. Commentators writing immediately after passage of the Act uniformly reached the same conclusion. The A. B. A. Committee that drafted the legislation wrote: "So far as the present law declares simply the policy of recognizing and enforcing arbitration agreements in the Federal courts it does not encroach upon the province of the individual states." Committee on Commerce, Trade and Commercial Law, *supra*, at 155. See also Cohen & Dayton, *supra*, at 276–277; Baum & Pressman, The Enforcement of Commercial Arbitration Agreements in the Federal Courts, 8 N. Y. U. L. Q. Rev. 428, 459 (1931). Williston wrote: "Inasmuch as arbitration acts are deemed procedural, the United States Act applies only to the federal courts . . . ." 6 S. Williston & G. Thompson, The Law of Contracts 5368 (rev. ed. 1938).

More recent students of the FAA uniformly and emphatically reach the same conclusion. *Prima Paint*, 388 U. S., at 424 (Black, J., dissenting); Note, 73 Harv. L. Rev. 1382 (1960); Note, Erie, Bernhardt, and Section 2 of the United States Arbitration Act: A Farrago of Rights, Remedies, and a Right to a Remedy, 69 Yale L. J. 847, 863 (1960); Note, Scope of the United States Arbitration Act in Commercial Arbitration: Problems in Federalism, 58 Nw. U. L. Rev. 468, 492 (1963).

> "The matter is properly the subject of Federal action. Whether an agreement for arbitration shall be enforced or not is a question of procedure to be determined by the law court in which the proceeding is brought and not one of substantive law to be determined by the law of the forum in which the contract is made. . . ."[16]

Plainly, a power derived from Congress' Art. III control over federal-court jurisdiction would not by any flight of fancy permit Congress to control proceedings in state courts.

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[14] For my present purpose it is enough to recognize that Congress relied *at least in part* on its Art. III power over the jurisdiction of the federal courts. See *Prima Paint*, 388 U. S., at 405, and n. 13 (majority opinion); *id.*, at 416–420 (Black, J., dissenting).

[15] Joint Hearings 38. See also *id.*, at 17, 37–38.

[16] H. R. Rep. No. 96, *supra* n. 8, at 1. Immediately after the FAA's enactment the A. B. A. drafters of the Act wrote:

"[The FAA] rests upon the constitutional provision by which Congress is authorized to establish and control inferior Federal courts. So far as congressional acts relate to the procedure in the Federal courts, they are clearly within the congressional power." Committee on Commerce, Trade and Commercial Law, *supra* n. 10, at 156.

Numerous other commentators writing shortly after the FAA's passage, as well as more recently, have made similar statments. See, *e. g.*, Cohen & Dayton, *supra* n. 10, at 275; Baum & Pressman, *supra*, at 430–431; Note, 73 Harv. L. Rev., at 1383; Note, 58 Nw. U. L. Rev., at 481.

The foregoing cannot be dismissed as "ambiguities" in the legislative history. It is accurate to say that the entire history contains only one ambiguity, and that appears in the single sentence of the House Report cited by the Court *ante*, at 12–13. That ambiguity, however, is definitively resolved elsewhere in the same House Report, see *supra*, at 27, and throughout the rest of the legislative history.

B

The structure of the FAA itself runs directly contrary to the reading the Court today gives to § 2. Sections 3 and 4 are the implementing provisions of the Act, and they expressly apply only to federal courts. Section 4 refers to the "United States district court[s]," and provides that it can be invoked only in a court that has jurisdiction under Title 28 of the United States Code. As originally enacted, § 3 referred, in the same terms as § 4, to "courts [or court] of the United States."[17] There has since been a minor amendment in § 4's phrasing, but no substantive change in either section's limitation to federal courts.[18]

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[17] The use of identical language in both sections was natural: § 3 applies when the party resisting arbitration initiates the federal-court action; § 4 applies to actions initiated by the party seeking to enforce an arbitration provision. Phrasing the two sections differently would have made no sense.

[18] In 1954, as a purely clerical change, Congress inserted "United States district court" in § 4 as a substitute for "court of the United States." Both House and Senate Reports explained: "'United States district court' was substituted for 'court of the United States' because, among Federal courts, such a proceeding would be brought only in a district court." H. R. Rep. No. 1981, 83d Cong., 2d Sess., 8 (1954); S. Rep. No. 2498, 83d Cong., 2d Sess., 9 (1954).

Even without this history, § 3's "courts of the United States" is a term of art whose meaning is unmistakable. State courts are "in" but not "of" the United States. Other designations of federal courts as the courts "of" the United States are found, for example, in 28 U. S. C. § 2201 (1976 ed., Supp. V) (declaratory judgments); Fed. Rule Evid. 501; and the Norris-La Guardia Act, 29 U. S. C. § 104, see *Boys Markets, Inc.* v. *Retail Clerks,* None of this Court's prior decisions has authoritatively construed the Act otherwise. It bears repeating that both *Prima Paint* and *Moses H. Cone* involved *federal-court* litigation. The applicability of the FAA to state-court proceedings was simply not before the Court in either case. Justice Black would surely be surprised to find either the majority opinion or his dissent in *Prima Paint* cited by the Court today, as both are, *ante*, at 11, 12. His dissent took pains to point out:

> "The Court here does not hold . . . that the body of federal substantive law created by federal judges under the Arbitration Act is required to be applied by state courts. A holding to that effect—which the Court seems to leave up in the air—would flout the intention of the framers of the Act." 388 U. S., at 424 (footnotes omitted).

Nothing in the *Prima Paint* majority opinion contradicts this statement.

The *Prima Paint* majority gave full but precise effect to the original congressional intent—it recognized that notwithstanding the intervention of *Erie* the FAA's restrictive focus on maritime and interstate contracts permits its application in federal diversity courts. Today's decision, in contrast, glosses over both the careful crafting of *Prima Paint* and the historical reasons that made *Prima Paint* necessary, and gives the FAA a reach far broader than Congress intended.[19]

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398 U. S. 235, 247 (1970) (BRENNAN, J.). References to state and federal courts together as courts "in" or "within" the United States are found in the Supremacy Clause ("Judges *in* every state"); 11 U. S. C. § 306 (1982 ed.); 22 U. S. C. § 2370(e)(2); and 28 U. S. C. § 1738. See also W. Sturges, Commercial Arbitrations and Awards § 480, p. 937 (1930).

[19] The Court suggests, *ante*, at 12, that it is unlikely that Congress would have created a federal substantive right that the state courts were not required to enforce. But it is equally rare to find a federal substantive right that cannot be enforced in federal court under the jurisdictional grant of 28 U. S. C. § 1331. Yet the Court states, *ante*, at 15–16, n. 9, that the FAA must be so construed. The simple answer to this puzzle is that in 1925 Congress did not believe it was creating a substantive right at all.

III

Section 2, like the rest of the FAA, should have no application whatsoever in state courts. Assuming, to the contrary, that § 2 *does* create a federal right that the state courts must enforce, state courts should nonetheless be allowed, at least in the first instance, to fashion their own procedures for enforcing the right. Unfortunately, the Court seems to direct that the arbitration clause at issue here must be *specifically* enforced; apparently no other means of enforcement is permissible.[20]

It is settled that a state court must honor federally created rights and that it may not unreasonably undermine them by invoking contrary local procedure. "'[T]he assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.'" *Brown* v. *Western R. Co. of Alabama*, 338 U. S. 294, 299 (1949). But absent specific direction from Congress the state courts have always been permitted to apply their own reasonable procedures when enforcing federal rights. Before we undertake to read a set of complex and mandatory procedures into § 2's brief and general language, we should at a minimum allow state courts and legislatures a chance to develop their own methods for enforcing the new federal rights. Some might choose to award compensatory or punitive damages for the violation of an arbitration agreement; some might award litigation costs to the party who remained willing to arbitrate; some might affirm the "validity and enforceability" of arbitration agreements in other ways. Any of these approaches could vindicate § 2 rights in a manner fully consonant with the language and background of that provision.[21]

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[20] If my understanding of the Court's opinion is correct, the Court has made § 3 of the FAA binding on the state courts. But as we have noted, *supra*, at 29, § 3 by its own terms governs only *federal-court* proceedings. Moreover, if § 2, standing alone, creates a federal right to specific enforcement of arbitration agreements §§ 3 and 4 are, of course, largely superfluous. And if § 2 implicitly incorporates §§ 3 and 4 procedures for making arbitration agreements enforceable before arbitration begins, why not also § 9 procedures concerning venue, personal jurisdiction, and notice for enforcing an arbitrator's award after arbitration ends? One set of procedures is of little use without the other.

The unelaborated terms of § 2 certainly invite flexible enforcement. At common law many jurisdictions were hostile to arbitration agreements. *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, 126 F. 2d 978, 982–984 (CA2 1942). That hostility was reflected in two different doctrines: "revocability," which allowed parties to repudiate arbitration agreements at any time before the arbitrator's award was made, and "invalidity" or "unenforceability," equivalent rules[22] that flatly denied any remedy for the failure to honor an arbitration agreement. In contrast, common-law jurisdictions that enforced arbitration agreements did so in at least three different ways—through actions for damages, actions for specific enforcement, or by enforcing sanctions imposed by trade and commercial associations on members who violated arbitration agreements.[23] In 1925 a forum allowing *any one* of these remedies would have been thought to recognize the "validity" and "enforceability" of arbitration clauses.

This Court has previously rejected the view that state courts can adequately protect federal rights only if "such courts in enforcing the Federal right are to be treated as Federal courts and subjected *pro hac vice* to [federal] limitations . . . ." *Minneapolis & St. Louis R. Co.* v. *Bombolis*, 241 U. S. 211, 221 (1916). As explained by Professor Hart:

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[21] See Note, 69 Yale L. J., at 864–865; Note, 73 Harv. L. Rev., at 1385; Note, 58 Nw. U. L. Rev., at 493.

[22] See J. Cohen, Commercial Arbitration and the Law 53–252 (1918); Sturges, *supra*, §§ 15–17 (discussing "revocability"); *id.*, § 22 (treating as equivalent different courts' declarations that arbitration agreements were "contrary to public policy," "invalid," "not binding upon the parties," "unenforceable," or "void"). See also Note, 73 Harv. L. Rev., at 1384.

[23] See Sturges, *supra*, §§ 22–24.

> "The general rule, bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them. . . . Some differences in remedy and procedure are inescapable if the different governments are to retain a measure of independence in deciding how justice should be administered. If the differences become so conspicuous as to affect advance calculations of outcome, and so to induce an undesirable shopping between forums, the remedy does not lie in the sacrifice of the independence of either government. It lies rather in provision by the federal government, confident of the justice of its own procedure, of a federal forum equally accessible to both litigants."[24]

In summary, even were I to accept the majority's reading of §2, I would disagree with the Court's disposition of this case. After articulating the nature and scope of the federal right it discerns in §2, the Court should remand to the state court, which has acted, heretofore, under a misapprehension of federal law. The state court should determine, at least in the first instance, what procedures it will follow to vindicate the newly articulated federal rights. Cf. *Missouri ex rel. Southern R. Co.* v. *Mayfield*, 340 U. S. 1, 5 (1950).

IV

The Court, *ante*, at 15–16, rejects the idea of requiring the FAA to be applied only in federal courts partly out of concern with the problem of forum shopping. The concern is unfounded. Because the FAA makes the federal courts equally accessible to both parties to a dispute, no forum shopping would be possible even if we gave the FAA a construction faithful to the congressional intent. In controversies involving incomplete diversity of citizenship there is simply no access to federal court and therefore no possibility of forum shopping. In controversies *with* complete diversity of citizenship the FAA grants federal-court access equally to both parties; no party can gain any advantage by forum shopping. Even when the party resisting arbitration initiates an action in state court, the opposing party can invoke FAA § 4 and promptly secure a federal-court order to compel arbitration. See, *e. g.*, *Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U. S. 1 (1983).

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[24] Hart, The Relations Between State and Federal Law, 54 Colum. L. Rev. 489, 508 (1954). See generally P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 567–573 (2d ed. 1973).

Ironically, the FAA was passed specifically to rectify forum-shopping problems created by this Court's decision in *Swift* v. *Tyson*, 16 Pet. 1 (1842).[25] By 1925 several major commercial States had passed state arbitration laws, but the federal courts refused to enforce those laws in diversity cases.[26] The drafters of the FAA might have anticipated *Bernhardt* by legislation and required federal diversity courts to adopt the arbitration law of the State in which they sat. But they deliberately chose a different approach. As was pointed out at congressional hearings,[27] an additional goal of the Act was to make arbitration agreements enforceable even in federal courts located in States that had no arbitration law. The drafters' plan for maintaining reasonable harmony between state and federal practices was not to bludgeon States into compliance, but rather to adopt a uniform federal law, patterned after New York's path-breaking state statute,[28] and simultaneously to press for passage of coordinated state legislation. The key language of the Uniform Act for Commercial Arbitration was, accordingly, identical to that in §2 of the FAA.[29]

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[25] See Joint Hearings 16 (statement of Mr. Cohen, A. B. A.); Senate Hearing 2. See also Cohen & Dayton, *supra* n. 10, at 275–276; Sturges & Murphy, Some Confusing Matters Relating to Arbitration under the United States Arbitration Act, 17 Law & Contemp. Prob. 580, 590 (1952).

[26] See, *e. g.*, *Atlantic Fruit Co.* v. *Red Cross Line*, 276 F. 319 (SDNY 1921), aff'd, 5 F. 2d 218 (CA2 1924); *Lappe* v. *Wilcox*, 14 F. 2d 861 (NDNY 1926).

[27] Joint Hearings 35.

[28] See S. Rep. No. 536, *supra* n. 8, at 3.

In summary, forum-shopping concerns in connection with the FAA are a distraction that does not withstand scrutiny. The Court ignores the drafters' carefully devised plan for dealing with those problems.

V

Today's decision adds yet another chapter to the FAA's already colorful history. In 1842 this Court's ruling in *Swift* v. *Tyson, supra,* set up a major obstacle to the enforcement of state arbitration laws in federal diversity courts. In 1925 Congress sought to rectify the problem by enacting the FAA; the intent was to create uniform law binding only in the federal courts. In *Erie R. Co.* v. *Tompkins,* 304 U. S. 64 (1938), and then in *Bernhardt Polygraphic Co.*, 350 U. S. 198 (1956), this Court significantly curtailed federal power. In 1967 our decision in *Prima Paint* upheld the application of the FAA in a *federal-court* proceeding as a valid exercise of Congress' Commerce Clause and admiralty powers. Today the Court discovers a federal right in FAA §2 that the state courts must enforce. Apparently confident that state courts are not competent to devise their own procedures for protecting the newly discovered federal right, the Court summarily prescribes a specific procedure, found nowhere in §2 or its common-law origins, that the state courts are to follow.

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[29] The Uniform Act tracked the "valid, irrevocable, and enforceable" language of §2. See 47 A. B. A. Rep. 318 (1922). It was also hoped that other States might pattern their arbitration statutes directly after the federal Act. See, *e. g.*, Joint Hearings 28. By 1953 it was reported that arbitration statutes "quite similar" to the FAA had been enacted in 12 other States. Kochery, The Enforcement of Arbitration Agreements in the Federal Courts: Erie v. Tompkins, 39 Cornell L. Q. 74, 76, n. 7 (1953). See also *Ludwig Mowinckels Rederi* v. *Dow Chemical Co.*, 25 N. Y. 2d 576, 584–585, 255 N. E. 2d 774, 778–779 (1970).

Today's decision is unfaithful to congressional intent, unnecessary, and, in light of the FAA's antecedents and the intervening contraction of federal power, inexplicable. Although arbitration is a worthy alternative to litigation, today's exercise in judicial revisionism goes too far. I respectfully dissent.

PULLEY, WARDEN *v.* HARRIS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 82-1095. Argued November 7, 1983—Decided January 23, 1984

Respondent was convicted of a capital crime in a California court and was sentenced to death, and the California Supreme Court affirmed, rejecting the claim that California's capital punishment statute was invalid under the Federal Constitution because it failed to require the California Supreme Court to compare respondent's sentence with sentences imposed in similar capital cases and thereby to determine whether they were proportionate. After habeas corpus relief was denied by the state courts, respondent sought habeas corpus in Federal District Court, again contending that he had been denied the comparative proportionality review assertedly required by the Constitution. The District Court denied the writ, but the Court of Appeals held that comparative proportionality review was constitutionally required.

Held:

1. There is no merit to respondent's contention that the Court of Appeals' judgment should be affirmed solely on the ground that state decisional law entitles him to comparative proportionality review. Under 28 U. S. C. § 2241, a federal court may not issue a writ of habeas corpus on the basis of a perceived error of state law. In rejecting respondent's demand for proportionality review, the California Supreme Court did not suggest that it was in any way departing from state case-law precedent. Moreover, if respondent's claim is that because of an evolution of state law he would now enjoy the kind of proportionality review that has so far been denied him, the state courts should consider the matter, if they are so inclined, free of the constraints of the federal writ of habeas corpus. Pp. 41-42.

2. The Eighth Amendment does not require, as an invariable rule in every case, that a state appellate court, before it affirms a death sentence, compare the sentence in the case before it with the penalties imposed in similar cases if requested to do so by the prisoner. Pp. 44-54.

(a) This Court's cases do not require comparative proportionality review by an appellate court in every capital case. The outcome in *Gregg* v. *Georgia*, 428 U. S. 153 (upholding Georgia's statutory scheme which required comparative proportionality review), and *Proffitt* v. *Florida*, 428 U. S. 242 (upholding Florida's scheme under which the appellate court performed proportionality review despite the absence of a statutory requirement), did not hinge on proportionality review. That some schemes providing proportionality review are constitutional does not mean that such review is indispensable. Moreover, *Jurek* v. *Texas*, 428 U. S. 262, upheld Texas' scheme even though neither the statute nor state case law provided for comparative proportionality review. Pp. 44–51.

(b) Assuming that there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review, the California statute involved here is not of that sort. Pp. 51–54.

692 F. 2d 1189, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined, and in all but Part III of which STEVENS, J., joined. STEVENS, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 54. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 59.

Michael D. Wellington, Deputy Attorney General of California, argued the cause for petitioner. With him on the briefs were *John K. Van De Kamp*, Attorney General, *Daniel J. Kremer*, Chief Assistant Attorney General, *Steven V. Adler*, Deputy Attorney General, and *Harley D. Mayfield*, Assistant Attorney General.

Anthony G. Amsterdam argued the cause for respondent. With him on the brief were *Quin Denvir*, *Charles M. Sevilla*, *Ezra Hendon*, and *Michael J. McCabe*.*

JUSTICE WHITE delivered the opinion of the Court.

Respondent Harris was convicted of a capital crime in a California court and was sentenced to death.[1] Along with many other challenges to the conviction and sentence, Harris claimed on appeal that the California capital punishment statute was invalid under the United States Constitution because it failed to require the California Supreme Court to compare Harris' sentence with the sentences imposed in similar capital

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**Charles A. Pulaski, Jr.*, filed a brief for the National Council on Crime and Delinquency as *amicus curiae* urging affirmance.

[1] The evidence at trial established that on July 5, 1978, respondent and his brother decided to steal a getaway car for a bank robbery in Mira Mesa, Cal. Respondent approached two teenaged boys eating hamburgers in their car, and forced them at gunpoint to drive him to a nearby wooded area. His brother followed. They parked the cars, and walked partway up a trail. Respondent told the boys he was going to use their car to rob a bank. They offered to walk to the top of the hill, wait a while, and then

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report the car as stolen, giving misleading descriptions of the thieves. Respondent approved the plan, but when one of the boys moved off into the bushes, he shot the other. He pursued and killed the fleeing boy, then returned and fired several more shots into the body of his first victim. Respondent finished the boys' hamburgers, and he and his brother then went ahead with the bank robbery. They were apprehended soon thereafter and confessed to the killings and the robbery.

A jury convicted respondent of kidnaping, robbery, and the first-degree murder of both boys. In accordance with the California death sentencing scheme then in effect, it also found that the statutory "special circumstances" charged by the prosecution were proved beyond a reasonable doubt: respondent had been convicted of more than one offense of first-degree murder, Cal. Penal Code Ann. § 190.2(c)(5) (West Supp. 1978), and each of the murders was willful, deliberate, premeditated, and committed during the commission of kidnaping and robbery, §§ 190.2(c)(3)(i), (ii). The proper punishment was therefore either death or life imprisonment without the possibility of parole, to be determined at a separate sentencing hearing. At that hearing, the State introduced evidence that respondent had been convicted of manslaughter in 1975; that he had been found in possession of a makeshift knife and a garrote while in prison; that he and others had sodomized another inmate; and that he had threatened that inmate's life. Respondent took the stand and testified to his dismal childhood, his minimal education, and the conviction of his father for sexually molesting respondent's sisters. He stated that his brother had fired the first shots and that he was sorry about the murders. The jury was then provided with a list of factors to help it decide upon a penalty. It chose death. The trial judge denied the automatic motion to modify the judgment. See § 190.4(e).

Respondent was sentenced under the 1977 California death penalty statute, 1977 Cal. Stats., ch. 316, pp. 1255–1266, which was codified at Cal. Penal Code Ann. §§ 190–190.6 (West Supp. 1978). The 1977 statute was replaced in late 1978 by the substantially similar provisions now in effect. See Cal. Pen. Code Ann. §§ 190–190.7 (West Supp. 1983). Unless otherwise noted, references in this opinion are to the 1977 statute. For the most part, however, what is said applies equally to the current California statute.

cases and thereby to determine whether they were proportionate.[2] Rejecting the constitutional claims by citation to earlier cases, the California Supreme Court affirmed. *People* v. *Harris*, 28 Cal. 3d 935, 623 P. 2d 240 (1981).[3] We denied certiorari. 454 U. S. 882 (1981).

Harris then sought a writ of habeas corpus in the state courts. He again complained of the failure to provide him with comparative proportionality review. The writ was denied without opinion, and we denied certiorari. *Harris* v. *California*, 457 U. S. 1111 (1982). Harris next sought habeas corpus in the United States District Court for the Southern District of California, pressing the claim, among others, that he had been denied the comparative proportionality review assertedly required by the United States Constitution. The District Court denied the writ and refused to stay Harris' execution, but issued a certificate of probable cause. The Court of Appeals, after holding that the proportionality review demanded by Harris was constitutionally required, vacated the judgment of the District Court and ordered that the writ issue relieving Harris of the death sentence unless within 120 days the California Supreme Court undertook to determine whether the penalty imposed on Harris is proportionate to sentences imposed for similar crimes.[4] 692 F. 2d 1189 (1982). We granted the State's petition for certiorari presenting the question whether the proportionality review mandated by the Court of Appeals is required by the United States Constitution. 460 U. S. 1036 (1983).

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[2] There has been some confusion as to whether Harris sought proportionality review on direct appeal. The record filed with us contains a copy of his appellate brief. The brief is largely identical to his federal habeas petition, which is also in the record, and, from what we can infer, to his state petition, which is not. In his appellate brief, Harris argued that the California scheme was constitutionally defective for failure to establish a proportionality review mechanism. His habeas petitions also included an affidavit detailing perceived inconsistencies in California capital sentencing and identifying similar cases in which the death sentence was not imposed. This affidavit was not presented to the California Supreme Court on direct appeal.

[3] Three justices joined the opinion of the court. Justice Tobriner concurred to note that he considered the death penalty statute unconstitutional but felt bound by a previous ruling from which he had dissented. Chief Justice Bird, joined by Justice Mosk, dissented on the ground that pretrial publicity had denied respondent a fair trial.

I

Harris concedes that the Court of Appeals' judgment rested on a federal constitutional ground. He nonetheless contends that we should affirm the judgment, which has the effect of returning the case to the state courts, because state law may entitle him to the comparative proportionality review that he has unsuccessfully demanded. We are unimpressed with the submission. Under 28 U. S. C. § 2241, a writ of habeas corpus disturbing a state-court judgment may issue only if it is found that a prisoner is in custody "in violation of the Constitution or laws or treaties of the United States." 28 U. S. C. § 2241(c)(3). A federal court may not issue the writ on the basis of a perceived error of state law.

Even if an error of state law could be sufficiently egregious to amount to a denial of equal protection or of due process of law guaranteed by the Fourteenth Amendment, Harris' submission is not persuasive. He relies on *People* v. *Frier-*

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[4] The court rejected Harris' other constitutional challenges to the California statute. First, it found that the list of aggravating and mitigating circumstances adequately limited the jury's discretion, even though the factors were not identified as aggravating or mitigating and even though the jury was allowed to consider nonstatutory factors. Second, it held that there was no constitutional requirement that the appropriateness of the death penalty be established beyond a reasonable doubt. Third, written findings by the jury were not constitutionally required, at least where, as in California, the judge provides such a statement. The court remanded, however, for a possible evidentiary hearing on Harris' claim that the death penalty was being discriminatorily administered in California, and for a closer look at the state-court record to determine whether the California Supreme Court's conclusion that pretrial publicity was not unfairly prejudicial was adequately supported.

son, 25 Cal. 3d 142, 599 P. 2d 587 (1979), and *People* v. *Jackson*, 28 Cal. 3d 264, 618 P. 2d 149 (1980), for the proposition that proportionality review should have been extended to him as a matter of state law. But since deciding those cases, the California Supreme Court has twice rejected Harris' demand for proportionality review without suggesting that it was in any way departing from precedent. Indeed, on direct review, it indicated that Harris' constitutional claims had been adversely decided in those very cases.

Finally, if Harris' claim is that because of an evolution of state law he would now enjoy the kind of proportionality review that has so far been denied him, that claim, even if accurate,[5] would not warrant issuing a writ of habeas corpus. Rather it would appear to be a matter that the state courts should consider, if they are so inclined, free of the constraints of the federal writ. Accordingly, we deem it necessary to reach the constitutional question on which certiorari was granted.

II

At the outset, we should more clearly identify the issue before us. Traditionally, "proportionality" has been used with reference to an abstract evaluation of the appropriateness of a sentence for a particular crime. Looking to the gravity of the offense and the severity of the penalty, to sentences imposed for other crimes, and to sentencing practices in other jurisdictions, this Court has occasionally struck down punishments as inherently disproportionate, and therefore cruel and unusual, when imposed for a particular crime or category of crime. See, *e. g., Solem* v. *Helm,* 463 U. S. 277 (1983); *Enmund* v. *Florida,* 458 U. S. 782 (1982); *Coker* v. *Georgia,* 433 U. S. 584 (1977). The death penalty is not in all cases a disproportionate penalty in this sense. *Gregg* v. *Georgia,* 428 U. S. 153, 187 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.); *id.,* at 226 (WHITE, J., concurring in judgment).

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[5] None of the California Supreme Court's many reversals in capital cases was based on a finding that the sentence was disproportionate to that imposed on similar defendants for similar crimes. We are aware of only one case beside this one in which the court affirmed a death sentence imposed under the 1977 or later statute. *People* v. *Jackson*, 28 Cal. 3d 264, 618 P. 2d 149 (1980). No proportionality review of the sort at issue here was conducted in that case.

At oral argument, counsel for respondent pointed to *People* v. *Dillon*, 34 Cal. 3d 441, 668 P. 2d 697 (1983), as an example of California's evolving practice of proportionality review. There the court reduced a first-degree murder conviction carrying a life sentence to a second-degree conviction. The court relied in part on the disparity between Dillon's punishment and that received by the six other participants in the crime. *Dillon* was not a death case, did not involve any cross-case comparison, and hardly signifies an established practice of proportionality review.

The proportionality review sought by Harris, required by the Court of Appeals,[6] and provided for in numerous state statutes[7] is of a different sort. This sort of proportionality review presumes that the death sentence is not disproportionate to the crime in the traditional sense. It purports to inquire instead whether the penalty is nonetheless unacceptable in a particular case because disproportionate to the punishment imposed on others convicted of the same crime. The issue in this case, therefore, is whether the Eighth Amendment, applicable to the States through the Fourteenth

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[6] The Court of Appeals noted a distinction between the proportionality of the death penalty to the crime for which it was imposed, and the proportionality of a given defendant's sentence to other sentences imposed for similar crimes. "This latter proportionality review . . . is what concerns us here." 692 F. 2d 1189, 1196 (1982).

[7] Under the much-copied Georgia scheme, for example, the Supreme Court is required in every case to determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Ga. Code. Ann. § 17-10-35(c)(3) (1982). If the court affirms the death sentence, it is to include in its decision reference to similar cases that it has taken into consideration. § 17-10-35(e). The court is required to maintain records of all capital felony cases in which the death penalty was imposed since 1970. § 17-10-37(a).

Amendment, requires a state appellate court, before it affirms a death sentence, to compare the sentence in the case before it with the penalties imposed in similar cases if requested to do so by the prisoner. Harris insists that it does and that this is the invariable rule in every case. Apparently, the Court of Appeals was of the same view. We do not agree.

III

Harris' submission is rooted in *Furman* v. *Georgia*, 408 U. S. 238 (1972). In *Furman*, the Court concluded that capital punishment, as then administered under statutes vesting unguided sentencing discretion in juries and trial judges, had become unconstitutionally cruel and unusual punishment. The death penalty was being imposed so discriminatorily, *id.*, at 240 (Douglas, J., concurring), so wantonly and freakishly, *id.*, at 306 (Stewart, J., concurring), and so infrequently, *id.*, at 310 (White, J., concurring), that any given death sentence was cruel and unusual. In response to that decision, roughly two-thirds of the States promptly redrafted their capital sentencing statutes in an effort to limit jury discretion and avoid arbitrary and inconsistent results. All of the new statutes provide for automatic appeal of death sentences. Most, such as Georgia's, require the reviewing court, to some extent at least, to determine whether, considering both the crime and the defendant, the sentence is disproportionate to that imposed in similar cases. Not every State has adopted such a procedure. In some States, such as Florida, the appellate court performs proportionality review despite the absence of a statutory requirement; in others, such as California and Texas, it does not.

Four years after *Furman*, this Court examined several of the new state statutes. We upheld one of each of the three sorts mentioned above. See *Gregg* v. *Georgia*, *supra*; *Proffitt* v. *Florida*, 428 U. S. 242 (1976); *Jurek* v. *Texas*, 428 U. S. 262 (1976). Needless to say, that some schemes providing proportionality review are constitutional does not mean that such review is indispensable. We take statutes as we find them. To endorse the statute as a whole is not to say that anything different is unacceptable. As was said in *Gregg*, "[w]e do not intend to suggest that only the above-described procedures would be permissible under *Furman* or that any sentencing system constructed along these general lines would inevitably satisfy the concerns of *Furman*, for each distinct system must be examined on an individual basis." 428 U. S., at 195 (footnote omitted). Examination of our 1976 cases makes clear that they do not establish proportionality review as a constitutional requirement.

In *Gregg*, six Justices concluded that the Georgia system adequately directed and limited the jury's discretion. The bifurcated proceedings, the limited number of capital crimes, the requirement that at least one aggravating circumstance be present, and the consideration of mitigating circumstances minimized the risk of wholly arbitrary, capricious, or freakish sentences. In the opinion announcing the judgment of the Court, three Justices concluded that sentencing discretion under the statute was sufficiently controlled by clear and objective standards. *Id.*, at 197–198. In a separate concurrence, three other Justices found sufficient reason to expect that the death penalty would not be imposed so wantonly, freakishly, or infrequently as to be invalid under *Furman*. 428 U. S., at 222.

Both opinions made much of the statutorily required comparative proportionality review. *Id.*, at 198, 204–206, 222–223. This was considered an additional safeguard against arbitrary or capricious sentencing. While the opinion of Justices Stewart, POWELL, and STEVENS suggested that some form of meaningful appellate review is required, *id.*, at 153, 198, 204–206, those Justices did not declare that comparative review was so critical that without it the Georgia statute would not have passed constitutional muster. Indeed, in summarizing the components of an adequate capital sentencing scheme, Justices Stewart, POWELL, and STEVENS did not mention comparative review:

> "[T]he concerns expressed in *Furman* . . . can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information." *Id.*, at 195.

In short, the Court of Appeals erred in concluding that *Gregg* required proportionality review.

There is even less basis for reliance on *Proffitt* v. *Florida*, *supra*. The Florida statute provides for a bifurcated procedure and forecloses the death penalty unless the sentencing authority finds that at least one of eight statutory aggravating circumstances is present and is not outweighed by any mitigating circumstances. The joint opinion of Justices Stewart, POWELL, and STEVENS observed that the Florida scheme, like its Georgia counterpart, requires the sentencer to focus on the individual circumstances of each homicide and each defendant. 428 U. S., at 251. Also, by vesting ultimate sentencing authority in the judge rather than the jury, the statute was expected to yield more consistent sentencing at the trial court level. *Id.*, at 252. Only after concluding that trial judges are given specific and detailed guidance to assist them in deciding whether to impose the death penalty did the opinion observe that death sentences are reviewed to ensure that they are consistent with the sentences imposed in similar cases. *Id.*, at 250–251.[8] The opinion concurring in the judgment filed by three other Justices approved the Florida statute without even mentioning appellate review. *Id.*, at 260–261.

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[8] JUSTICE STEVENS implies that the joint opinion in *Proffitt* did not really understand the Florida Supreme Court to conduct comparative proportionality review. *Post*, at 56. While his reading of that opinion does, of course, further support our interpretation of *Proffitt*, we do not share

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it. The opinion stated that the Florida court considered its function to be the same as its "Georgia counterpart," and that it would review a particular sentence "'in light of the other decisions and determine whether or not the punishment is too great.'" 428 U. S., at 251, quoting *State* v. *Dixon*, 283 So. 2d 1, 10 (Fla. 1973). Thus, sentencing "decisions are reviewed to ensure that they are consistent with other sentences imposed in similar circumstances." 428 U. S., at 253. As JUSTICE STEVENS notes, the opinion went on to point out that the Florida Supreme Court "has several times compared the circumstances of a case under review with those of previous cases in which it has assessed the imposition of death sentences. [Citations omitted.] By following this procedure the Florida court has in effect adopted the type of proportionality review mandated by the Georgia statute." *Id.*, at 259. The most natural reading of this language is that its authors believed that Florida did conduct proportionality review. Indeed, that is how the Florida Supreme Court, for one, has interpreted it. *E. g.*, *McCaskill* v. *State*, 344 So. 2d 1276, 1280 (1977).

While acknowledging that at present the Florida Supreme Court undertakes to provide proportionality review in every case, see *Brown* v. *Wainwright*, 392 So. 2d 1327, cert. denied, 454 U. S. 1000 (1981), JUSTICE STEVENS says that that has not always been its practice, citing a long list of cases in which no such review was explicitly performed. *Post*, at 56–58, n. The Florida Supreme Court has undeniably become more enthusiastic, or at least more explicit, about proportionality review in recent years. See, *e. g.*, *Williams* v. *State*, 437 So. 2d 133 (1983); *Adams* v. *State*, 412 So. 2d 850 (1982). However, comparative proportionality review has been part of at least the theory of appellate review in Florida since the enactment of that State's first post-*Furman* capital punishment statute. It was endorsed in the very first case decided under that statute, see *State* v. *Dixon*, *supra*, at 10, and frequently acknowledged and performed thereafter, see, *e. g.*, *Alvord* v. *State*, 322 So. 2d 533, 540–541 (1975); *Alford* v. *State*, 307 So. 2d 433, 445 (1975); *Lamadline* v. *State*, 303 So. 2d 17, 20 (1974). As the Florida Supreme Court has itself recently stated: "Since the inception of the 'new' death penalty statute in 1972, this Court has engaged in a proportionality review of death cases to ensure rationality and consistency in the imposition of the death penalty." *Sullivan* v. *State*, 441 So. 2d 609, 613 (1983) (citing *State* v. *Dixon*, *supra*).

JUSTICE STEVENS points out that the Florida Supreme Court has not conducted an express review of the proportionality of every capital sentence it has reviewed. It is worth bearing in mind that in many of the

That *Gregg* and *Proffitt* did not establish a constitutional requirement of proportionality review is made clearer by *Jurek* v. *Texas*, 428 U. S. 262 (1976), decided the same day. In *Jurek* we upheld a death sentence even though neither the statute, as in Georgia, nor state case law, as in Florida, provided for comparative proportionality review. Justices Stewart, POWELL, and STEVENS, after emphasizing the limits on the jury's discretion,[9] concluded:

> "Texas' capital-sentencing procedures, like those of Georgia and Florida, do not violate the Eighth and Fourteenth Amendments. By narrowing its definition of capital murder, Texas has essentially said that there must be at least one statutory aggravating circumstance in a first-degree murder case before a death sentence may even be considered. By authorizing the defense to bring before the jury at the separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced, Texas has ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function. By providing

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decisions he cites the court reversed the death sentence by examining the circumstances of the particular case; proportionality review would therefore have been superfluous. And the fact that in others the court was not explicit about comparative review does not mean none was undertaken. See *Messer* v. *State*, 439 So. 2d 875, 879 (1983) (acknowledging proportionality review requirement, but rejecting "the assertion that in our written opinion we must explicitly compare each death sentence with past capital cases"). In any event, the critical question is what the *Proffitt* Court thought the Florida scheme was. In that regard, the joint opinion speaks for itself.

[9] "Thus, Texas law essentially requires that one of five aggravating circumstances be found before a defendant can be found guilty of capital murder, and that in considering whether to impose a death sentence the jury may be asked to consider whatever evidence of mitigating circumstances the defense can bring before it. It thus appears that, as in Georgia and Florida, the Texas capital-sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death." 428 U. S., at 273–274.

> prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law. Because this system serves to assure that sentences of death will not be 'wantonly' or 'freakishly' imposed, it does not violate the Constitution." *Id.*, at 276.

That the three Justices considered such appellate review as Texas provided "a means to promote the evenhanded, rational, and consistent imposition of death sentences," *ibid.*, is revealing. First, it makes plain that, at least in light of the other safeguards in the Texas statute, proportionality review would have been constitutionally superfluous. Second, it suggests that the similarly worded references to appellate review in *Gregg* and *Proffitt* were focused not on proportionality review as such, but only on the provision of some sort of prompt and automatic appellate review. The concurrence expressing the views of three other Justices sustained the Texas statute by focusing solely on the limitations on the jury's discretion, without even mentioning appellate review.[10]

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[10] "Under the revised law, the substantive crime of murder is defined; and when a murder occurs in one of the five circumstances set out in the statute, the death penalty *must* be imposed if the jury also makes the certain additional findings against the defendant. Petitioner claims that the additional questions upon which the death sentence depends are so vague that in essence the jury possesses standardless sentencing power; but I agree with Justices STEWART, POWELL, and STEVENS that the issues posed in the sentencing proceeding have a common-sense core of meaning and that criminal juries should be capable of understanding them. The statute does not extend to juries discretionary power to dispense mercy, and it should not be assumed that juries will disobey or nullify their instructions. As of February of this year, 33 persons, including petitioner, had been sentenced to death under the Texas murder statute. I cannot conclude at this juncture that the death penalty under this system will be imposed so seldom and arbitrarily as to serve no useful penological function and hence fall within the reach of the decision announced by five Members of the Court in *Furman* v. *Georgia*. . . . [T]he Texas capital punishment statute limits the imposition of the death penalty to a narrowly defined

In view of *Jurek*, we are quite sure that at that juncture the Court had not mandated comparative proportionality review whenever a death sentence was imposed.[11]

Harris also relies on *Zant* v. *Stephens*, 462 U. S. 862 (1983), which was announced after the Court of Appeals' decision in this case. *Zant* did not depart from *Gregg* and did not question *Jurek*. Indeed, *Jurek* was cited in support of the decision. 462 U. S., at 875–876, n. 13. While emphasizing the importance of mandatory appellate review under the Georgia statute, *id.*, at 875 and 876, we did not hold that without comparative proportionality review the statute would be unconstitutional. To the contrary, we relied on the jury's finding of aggravating circumstances, not the State Supreme Court's finding of proportionality, as rationalizing the sentence.[12] Thus, the emphasis was on the constitutionally necessary narrowing function of statutory aggravating circumstances. Proportionality review was considered to be an additional safeguard against arbitrarily imposed death sentences, but we certainly did not hold that comparative review was constitutionally required.

There is thus no basis in our cases for holding that comparative proportionality review by an appellate court is required in every case in which the death penalty is imposed and the

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group of the most brutal crimes and aims at limiting its imposition to similar offenses occurring under similar circumstances." *Id.*, at 278–279 (WHITE, J., joined by BURGER, C. J., and REHNQUIST, J., concurring in judgment).

[11] See also *Woodson* v. *North Carolina*, 428 U. S. 280, 319 (1976) (REHNQUIST, J., dissenting) ("If the States wish to undertake such an effort [*i. e.*, proportionality review], they are undoubtedly free to do so, but surely it is not required by the United States Constitution").

[12] We upheld the death sentence even though the State Supreme Court had invalidated, as unconstitutionally vague, one of the three aggravating circumstances relied on by the jury. The two remaining circumstances "adequately differentiate[d] this case in an objective, evenhanded, and substantively rational way from the many Georgia murder cases in which the death penalty may not be imposed." 462 U. S., at 879.

defendant requests it. Indeed, to so hold would effectively overrule *Jurek* and would substantially depart from the sense of *Gregg* and *Proffitt*. We are not persuaded that the Eighth Amendment requires us to take that course.

IV

Assuming that there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review, the 1977 California statute is not of that sort. Under this scheme, a person convicted of first-degree murder is sentenced to life imprisonment unless one or more "special circumstances" are found, in which case the punishment is either death or life imprisonment without parole. Cal. Penal Code Ann. §§190, 190.2 (West Supp. 1978).[13] Special circumstances are alleged in the charging paper and tried with the issue of guilt at the initial phase of the trial. At the close of evidence, the jury decides guilt or innocence and determines whether the special circumstances alleged are present. Each special circumstance must be proved beyond a reasonable doubt. §190.4(a). If the jury finds the defendant guilty of first-degree murder and finds at least one special circumstance, the trial proceeds to a second phase to determine the appropriate penalty. Additional evidence may be offered and the jury is given a list of relevant factors.

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[13] Briefly, the statutory special circumstances are: (1) the murder was for profit; (2) the murder was perpetrated by an explosive; (3) the victim was a police officer killed in the line of duty; (4) the victim was a witness to a crime, killed to prevent his testifying in a criminal proceeding; (5) the murder was committed during the commission of robbery, kidnaping, rape, performance of a lewd or lascivious act on someone under 14, or burglary; (6) the murder involved torture; (7) the defendant had been previously convicted of first- or second-degree murder, or was convicted of more than one murder in the first or second degree in the instant proceeding. Cal. Penal Code Ann. §190.2 (West Supp. 1978). These are greatly expanded in the current statute. See Cal. Penal Code Ann. §190.2 (West Supp. 1983).

§ 190.3.[14] "After having heard and received all of the evidence, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall determine whether the penalty shall be death or life imprisonment without the possibility of parole." *Ibid.* If the jury returns a verdict of death, the defendant is deemed to move to modify the verdict. § 190.4(e). The trial judge then reviews the evidence and, in light of the statutory factors, makes an "independent determination as to whether the weight of the evidence supports the jury's findings and verdicts." *Ibid.* The judge is required to state on the record the reasons for his findings.

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[14] The statute does not separate aggravating and mitigating circumstances. Section 190.3 provides:

"In determining the penalty the trier of fact shall take into account any of the following factors if relevant:

"(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to § 190.1.

"(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.

"(c) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

"(d) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

"(e) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

"(f) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

"(g) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or the effects of intoxication.

"(h) The age of the defendant at the time of the crime.

"(i) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

"(j) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."

Ibid. If the trial judge denies the motion for modification, there is an automatic appeal. §§ 190.4(e), 1239(b). The statute does not require comparative proportionality review or otherwise describe the nature of the appeal.[15] It does state that the trial judge's refusal to modify the sentence "shall be reviewed." § 190.4(e). This would seem to include review of the evidence relied on by the judge. As the California Supreme Court has said, "the statutory requirements that the jury specify the special circumstances which permit imposition of the death penalty, and that the trial judge specify his reasons for denying modification of the death penalty, serve to assure thoughtful and effective appellate review, focusing upon the circumstances present in each particular case." *People* v. *Frierson,* 25 Cal. 3d, at 179, 599 P. 2d, at 609. That court has reduced a death sentence to life imprisonment because the evidence did not support the findings of special circumstances. *People* v. *Thompson,* 27 Cal. 3d 303, 611 P. 2d 883 (1980).

By requiring the jury to find at least one special circumstance beyond a reasonable doubt, the statute limits the death sentence to a small subclass of capital-eligible cases. The statutory list of relevant factors, applied to defendants within this subclass, "provide[s] jury guidance and lessen[s] the chance of arbitrary application of the death penalty," 692 F. 2d, at 1194, "guarantee[ing] that the jury's discretion will be guided and its consideration deliberate," *id.,* at 1195. The jury's "discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg,* 428 U. S., at 189. Its decision is reviewed by the trial judge and the State Supreme Court. On its face, this system, without any requirement or practice of comparative proportionality review, cannot be successfully challenged under *Furman* and our subsequent cases.

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[15] The provision for automatic appeal in the Texas statute considered in *Jurek* was similarly silent as to the exact nature of the appeal. 428 U. S., at 269.

Any capital sentencing scheme may occasionally produce aberrational outcomes. Such inconsistencies are a far cry from the major systemic defects identified in *Furman.* As we have acknowledged in the past, "there can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose death.'" *Zant* v. *Stephens*, 462 U. S., at 884, quoting *Lockett* v. *Ohio*, 438 U. S. 586, 605 (1978) (plurality opinion). As we are presently informed, we cannot say that the California procedures provided Harris inadequate protection against the evil identified in *Furman.* The Court of Appeals therefore erred in ordering the writ of habeas corpus to issue. Its judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, concurring in part and concurring in the judgment.

While I agree with the basic conclusion of Part III of the Court's opinion—our case law does not establish a constitutional requirement that comparative proportionality review be conducted by an appellate court in every case in which the death penalty is imposed—my understanding of our decisions in *Gregg* v. *Georgia*, 428 U. S. 153 (1976); *Proffitt* v. *Florida*, 428 U. S. 242 (1976); *Jurek* v. *Texas*, 428 U. S. 262 (1976); and *Zant* v. *Stephens*, 462 U. S. 862 (1983), is sufficiently different from that reflected in Part III to prevent me from joining that portion of the opinion.

While the cases relied upon by respondent do not establish that comparative proportionality review is a constitutionally required element of a capital sentencing system, I believe the case law does establish that appellate review plays an essential role in eliminating the systemic arbitrariness and capriciousness which infected death penalty schemes invalidated by *Furman* v. *Georgia*, 408 U. S. 238 (1972), and hence that some form of meaningful appellate review is constitutionally required.

The systemic arbitrariness and capriciousness in the imposition of capital punishment under statutory schemes invalidated by *Furman* resulted from two basic defects in those schemes. First, the systems were permitting the imposition of capital punishment in broad classes of offenses for which the penalty would always constitute cruel and unusual punishment. Second, even among those types of homicides for which the death penalty could be constitutionally imposed as punishment, the schemes vested essentially unfettered discretion in juries and trial judges to impose the death sentence. Given these defects, arbitrariness and capriciousness in the imposition of the punishment were inevitable, and given the extreme nature of the punishment, constitutionally intolerable. The statutes we have approved in *Gregg*, *Proffitt*, and *Jurek* were designed to eliminate each of these defects. Each scheme provided an effective mechanism for categorically narrowing the class of offenses for which the death penalty could be imposed and provided special procedural safeguards including appellate review of the sentencing authority's decision to impose the death penalty.

In *Gregg*, the opinion of Justices Stewart, POWELL, and STEVENS indicated that some form of meaningful appellate review is required, see 428 U. S., at 198, and that opinion, *id.*, at 204–206, as well as JUSTICE WHITE's opinion, see *id.*, at 224, focused on the proportionality review component of the Georgia statute because it was a prominent, innovative, and noteworthy feature that had been specifically designed to combat effectively the systemic problems in capital sentencing which had invalidated the prior Georgia capital sentencing scheme. But observations that this innovation is an effective safeguard do not mean that it is the only method of ensuring that death sentences are not imposed capriciously or that it is the only acceptable form of appellate review.

In *Proffitt*, the joint opinion of Justices Stewart, POWELL, and STEVENS explicitly recognized that the Florida "law differs from that of Georgia in that it does not require the court to conduct any specific form of review." 428 U. S., at

250–251. The opinion observed, however, that "meaningful appellate review" was made possible by the requirement that the trial judge justify the imposition of a death sentence with written findings, and further observed that the Supreme Court of Florida had indicated that death sentences would be reviewed to ensure that they are consistent with the sentences imposed in similar cases. *Id.*, at 251. Under the Florida practice as described in the *Proffitt* opinion, the appellate review routinely involved an independent analysis of the aggravating and mitigating circumstances in the particular case. *Id.*, at 253. Later in the opinion, in response to Proffitt's argument that the Florida appellate review process was "subjective and unpredictable," *id.*, at 258, we noted that the State Supreme Court had "several times" compared the circumstances of a case under review with those of previous cases in which the death sentence had been imposed and that by "following this procedure the Florida court has in effect adopted the type of proportionality review mandated by the Georgia statute." *Id.*, at 259. We did not, however, indicate that the particular procedure that had been followed "several times" was either the invariable routine in Florida,* or that it was an indispensable feature of meaningful appellate review.

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*And, of course, it was not the regular practice in Florida before *Proffitt* was decided. Proportionality review was not conducted in the following pre-*Proffitt* decisions: *Jones* v. *State*, 332 So. 2d 615, 619 (1976) *(per curiam)* (reversing death sentence as unwarranted under circumstances of particular case); *Henry* v. *State*, 328 So. 2d 430, 432 *(per curiam)* (affirming death sentence weighing circumstances in case before it), cert. denied, 429 U. S. 951 (1976); *Douglas* v. *State*, 328 So. 2d 18, 21–22 (same), cert. denied, 429 U. S. 871 (1976); *Thompson* v. *State*, 328 So. 2d 1, 5 (1976) (quotes language from *State* v. *Dixon*, 283 So. 2d 1 (Fla. 1973), concerning review in light of prior decisions, then reverses death sentence without considering other cases but instead based on facts in case before it); 328 So. 2d, at 5–6 (Adkins, J., concurring specially) (maintaining affirmance was merited based on his agreement with weighing of circumstances performed by trial judge); *Dobbert* v. *State*, 328 So. 2d 433, 441 (1976) (affirming death

The Texas statute reviewed in *Jurek*, like the Florida statute reviewed in *Proffitt*, did not provide for comparative review. We nevertheless concluded "that Texas' capital-

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sentence without cross-case proportionality review, but opinion did agree with trial judge's general remark that the crime was the most atrocious of which he had personal knowledge), aff'd, 432 U. S. 282 (1977); *Halliwell* v. *State*, 323 So. 2d 557, 561 (1975) *(per curiam)* (reversing death sentence based on weighing of circumstances in particular case); *Tedder* v. *State*, 322 So. 2d 908, 910 (1975) (establishing special standard of review in reviewing imposition of death sentence after jury recommendation of life sentence, and reversing death sentence under circumstances of particular case); *Swan* v. *State*, 322 So. 2d 485, 489 (1975) (same); *Gardner* v. *State*, 313 So. 2d 675, 677 (1975) (affirming death sentence based on weighing circumstances in case before it), cert. denied, 430 U. S. 349 (1977); *Spinkellink* v. *State*, 313 So. 2d 666, 671 (1975) (same), cert. denied, 428 U. S. 911 (1976); *Sawyer* v. *State*, 313 So. 2d 680, 682 (1975) (same), cert. denied, 428 U. S. 911 (1976); *Hallman* v. *State*, 305 So. 2d 180, 182 (1974) *(per curiam)* (same), cert. denied, 428 U. S. 911 (1976); *Sullivan* v. *State*, 303 So. 2d 632, 637–638 (1974) (specially concurring opinion joined by five justices citing *Dixon* for proposition that court's responsibility is to independently determine whether death penalty warranted and proceeds to affirm the death sentence based on assessment of circumstances in case before it), cert. denied, 428 U. S. 911 (1976); *Taylor* v. *State*, 294 So. 2d 648, 652 (1974) (reversing death sentence based on weighing of circumstances in particular case). Moreover, opinions issued shortly before and after *Proffitt* reveal a similar absence of comparative proportionality review. *Adams* v. *State*, 341 So. 2d 765, 769 (1976) (affirming death sentence and citing *Dixon* for proposition that role of court is to independently review circumstances in particular case and determine whether death sentence warranted), cert. denied, 434 U. S. 977 (1977); *Funchess* v. *State*, 341 So. 2d 762, 763 (1976) (affirming death sentence weighing circumstances in case before it), cert. denied, 434 U. S. 878 (1977); *Chambers* v. *State*, 339 So. 2d 204 (1976) *(per curiam)* (reversing death sentence based on circumstances of case before it); *Meeks* v. *State*, 339 So. 2d 186, 192 (1976) *(per curiam)* (affirming death sentence, compares sentence with that of accomplice only, affirms on ground that sentence warranted under circumstances of particular case), cert. denied, 439 U. S. 991 (1978); *Knight* v. *State*, 338 So. 2d. 201, 205 (1976) (affirming death sentence weighing circumstances in case before it); *Meeks* v. *State*, 336 So. 2d 1142, 1145 (1976) (same); see also *Cooper* v. *State*, 336 So. 2d 1133, 1142 (1976), cert. denied, 431 U. S. 925 (1977).

*[Footnote * is continued on p. 58]*

sentencing procedures, like those of Georgia and Florida," were constitutional because they assured that "sentences of death will not be 'wantonly' or 'freakishly' imposed." 428 U. S., at 276. That assurance rested in part on the statutory guarantee of meaningful appellate review. As we stated:

> "By providing prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law." *Ibid.*

Thus, in all three cases decided on the same day, we relied in part on the guarantee of meaningful appellate review, and we found no reason to differentiate among the three statutes in appraising the quality of the review that was mandated.

Last Term in *Zant* v. *Stephens*, 462 U. S. 862 (1983), we again reviewed the Georgia sentencing scheme. The Court observed that the appellate review of every death penalty proceeding "to determine whether the sentence was arbitrary or disproportionate" was one of the two primary features upon which the *Gregg* joint opinion's approval of the Georgia scheme rested. 462 U. S., at 876. While the Court did not focus on the comparative review element of the scheme in reaffirming the constitutionality of the Georgia statute, appellate review of the sentencing decision was deemed essential to upholding its constitutionality. *Id.*, at 876–877, and n. 15. The fact that the Georgia Supreme Court had reviewed the sentence in question "to determine whether it was arbitrary, excessive, or disproportionate"

The Florida Supreme Court now undertakes to provide proportionality review in every case, see *Brown* v. *Wainwright*, 392 So. 2d 1327, 1331, cert. denied, 454 U. S. 1000 (1981). As we noted in *Proffitt*, this practice does provide the "function of death sentence review with a maximum of rationality and consistency." 428 U. S., at 258–259. The fact that the practice is an especially good one, however, does not mean that it is an indispensable element of meaningful appellate review.

was relied upon to reject a contention that the statute was invalid as applied because of the absence of standards to guide the jury in weighing the significance of aggravating circumstances, *id.*, at 879–880 (footnote describing proportionality review omitted), and the mandatory appellate review was also relied upon in rejecting the argument that the subsequent invalidation of one of the aggravating circumstances found by the jury required setting aside the death sentence, *id.*, at 890. Once again, proportionality review was viewed as an effective, additional safeguard against arbitrary and capricious death sentences. While we did not hold that comparative proportionality review is a mandated component of a constitutionally acceptable capital sentencing system, our decision certainly recognized what was plain from *Gregg*, *Proffitt*, and *Jurek:* that some form of meaningful appellate review is an essential safeguard against the arbitrary and capricious imposition of death sentences by individual juries and judges.

To summarize, in each of the statutory schemes approved in our prior cases, as in the scheme we review today, meaningful appellate review is an indispensable component of the Court's determination that the State's capital sentencing procedure is valid. Like the Court, however, I am not persuaded that the particular form of review prescribed by statute in Georgia—comparative proportionality review—is the only method by which an appellate court can avoid the danger that the imposition of the death sentence in a particular case, or a particular class of cases, will be so extraordinary as to violate the Eighth Amendment.

Accordingly, I join in all but Part III of the Court's opinion and concur in the judgment.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Almost 12 years ago, in *Furman* v. *Georgia*, 408 U. S. 238 (1972), the Court concluded that the death penalty, as then administered under various state and federal statutes, constituted a cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. At that time, the Court was convinced that death sentences were being imposed in a manner that was so arbitrary and capricious that no individual death sentence could be constitutionally justified.[1] Four years later, faced with new death penalty statutes enacted by the States of Georgia, Florida, and Texas, a majority of the Court concluded that the procedural mechanisms included in those statutes provided sufficient protection to ensure their constitutional application. See *Gregg* v. *Georgia*, 428 U. S. 153 (1976); *Proffitt* v. *Florida*, 428 U. S. 242 (1976); *Jurek* v. *Texas*, 428 U. S. 262 (1976). Thus began a series of decisions from this Court in which, with some exceptions, it has been assumed that the death penalty is being imposed by the various States in a rational and nondiscriminatory way. Upon the available evidence, however, I am convinced that the Court is simply deluding itself, and also the American public, when it insists that those defendants who have already been executed or are today condemned to death have been selected on a basis that is neither arbitrary nor capricious, under any meaningful definition of those terms.

Moreover, in this case, the Court concludes that proportionality review of a death sentence is constitutionally unnecessary. Presumably this is so, even if a comparative review of death sentences imposed on similarly situated defendants might eliminate some, if only a small part, of the irrationality that currently surrounds the imposition of the death penalty. Because, in my view, the evidence available to the Court suggests that proportionality review does serve this limited purpose, I believe that the State of California, through a court of statewide jurisdiction, should be required to undertake proportionality review when examining any death sentence on appeal.

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[1] In a concurring opinion, I expressed the view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. *Furman* v. *Georgia*, 408 U. S., at 257. See also *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting). Nothing that has occurred during the past 12 years has given me any reason to change these views; if anything, I am today more persuaded of the unconstitutionality of the death penalty than ever before. I therefore adhere to the views I expressed in *Furman* and *Gregg*, and would vacate the death sentence imposed on the respondent, Robert Alton Harris.

I

A

In *Furman* v. *Georgia, supra,* and subsequent orders, see, *e. g.*, 408 U. S. 933–940 (1972), the Court invalidated all death sentences then existing in the various States. Although each of the five Justices concurring in the *per curiam* opinion of the Court authored a separate opinion, it has since been the accepted holding of *Furman* that, at a minimum, the death penalty cannot "be imposed under sentencing procedures that creat[e] a substantial risk that it [will] be inflicted in an arbitrary and capricious manner." *Gregg* v. *Georgia, supra,* at 188 (opinion of Stewart, POWELL, and STEVENS, JJ.).

This was the touchstone of Justice Stewart's concerns in *Furman:*

> "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders . . . , many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race. . . . I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so

> wantonly and so freakishly imposed." 408 U. S., at 309–310 (footnotes and citations omitted).

Likewise, JUSTICE WHITE concluded that "the death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." *Id.*, at 313. And, although focusing his analysis on the equal protection concerns of the Eighth Amendment, Justice Douglas substantially agreed, noting that "[t]he high service rendered by the 'cruel and unusual' punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups." *Id.*, at 256. See also *id.*, at 248, n. 11, 249 (Douglas, J., concurring) ("'A penalty . . . should be considered "unusually" imposed if it is administered arbitrarily or discriminatorily'") (quoting Goldberg & Dershowitz, Declaring the Death Penalty Unconstitutional, 83 Harv. L. Rev. 1773, 1790 (1970)); 408 U. S., at 274–277, 291–295 (BRENNAN, J., concurring).[2]

These concerns about the irrational imposition of the death penalty were not based on abstract speculation. Rather, they were premised on actual experience with the administration of the penalty by the various States. I will not attempt at this time to summarize the evidence available to the Court in 1972 when *Furman* was decided. See, *e. g.*, *id.*, at 249–252, 256–257, n. 21 (Douglas, J., concurring); *id.*, at 291–295 (BRENNAN, J., concurring); *id.*, at 309–310 (Stewart,

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[2] Even the dissenters viewed the concerns expressed about the arbitrary and capricious infliction of the death penalty as the primary basis for the Court's decision: "The decisive grievance of the opinions . . . is that the present system of discretionary sentencing in capital cases has failed to produce evenhanded justice; . . . that the selection process has followed no rational pattern." 408 U. S., at 398–399 (BURGER, C. J., dissenting).

J., concurring); *id.*, at 364–369 (MARSHALL, J., concurring). Suffice it to say that the Court was persuaded, both from personal experience in reviewing capital cases[3] and from the available research analyzing imposition of this extreme penalty, that the death penalty was being administered in an arbitrary and capricious manner.

Moreover, this stated concern with the irrational imposition of the death penalty did not cease with the judgments of the *Furman* Court; indeed, the same focus has been reflected in the Court's decisions ever since. See, *e. g.*, *Barclay* v. *Florida*, 463 U. S. 939, 958–960 (1983) (STEVENS, J., concurring in judgment); *Zant* v. *Stephens*, 462 U. S. 862, 874 (1983) (characterizing *Furman* as holding that "'where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action'") (quoting *Gregg* v. *Georgia*, 428 U. S., at 189 (opinion of Stewart, POWELL, and STEVENS, JJ.)); *Eddings* v. *Oklahoma*, 455 U. S. 104, 111 (1982) (noting that the Court "has attempted to provide standards for a constitutional death penalty that would serve both goals of measured, consistent application and fairness to the accused"); *id.*, at 112 (noting that the Court has "insiste[d] that capital punishment be imposed fairly, and with reasonable consistency, or not at all"). Hence, if any principle is an accepted part of the Court's death penalty decisions during the past 12 years, it is that the irrational application of the death penalty, as evidenced by an examination of when the death penalty is actually imposed, cannot be constitutionally defended.

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[3] In his concurring opinion, JUSTICE WHITE focused on his personal experience: "I need not restate the facts and figures that appear in the opinions of my Brethren. Nor can I 'prove' my conclusion from these data. But, like my Brethren, I must arrive at judgment; and I can do no more than state a conclusion based on 10 years of almost daily exposure to the facts and circumstances of hundreds and hundreds of federal and state criminal cases involving crimes for which death is the authorized penalty." *Id.*, at 313.

Even while repeating this principle, however, the Court since *Gregg* v. *Georgia*, *supra*, and its companion cases, has allowed executions to take place, and death rows to expand, without fully examining the results obtained by the death penalty statutes enacted in response to the *Furman* decision. Indeed, the Court seems content to conclude that, so long as certain procedural protections exist, imposition of the death penalty is constitutionally permissible. But a sentencer's consideration of aggravating and mitigating circumstances, see *ante*, at 51–53, combined with some form of meaningful appellate review, see *ante*, at 54–55, 59 (STEVENS, J., concurring in part), does not by itself ensure that a death sentence in any particular case, or the death penalty in general, is a constitutional exercise of the State's power. Given the emotions generated by capital crimes, it may well be that juries, trial judges, and appellate courts considering sentences of death are invariably affected by impermissible considerations. Although we may tolerate such irrationality in other sentencing contexts, the premise of *Furman* was that such arbitrary and capricious decisionmaking is simply invalid when applied to "'a matter [as] grave as the determination of whether a human life should be taken or spared.'" *Zant* v. *Stephens*, *supra*, at 874. As executions occur with more frequency, therefore, the time is fast approaching for the Court to reexamine the death penalty, not simply to ensure the existence of adequate procedural protections, but more importantly to reevaluate the imposition of the death penalty for the irrationality prohibited by our decision in *Furman*.

B

The current evidence of discriminatory and irrational application of the death penalty has yet to be completely or systematically marshaled. What evidence has been compiled, moreover, has not been properly presented to the Court and is not at issue in this case. Nevertheless, as in other recent decisions, the Court today evaluates the procedural mechanism at issue—in this case, comparative proportionality review—without regard to whether the actual administration of the death penalty by the States satisfies the concerns expressed in *Furman.*

The most compelling evidence that the death penalty continues to be administered unconstitutionally relates to the racial discrimination that apparently, and perhaps invariably, exists in its application. The Court correctly avoids the question of racial discrimination as not properly presented in this case. See *ante,* at 41, n. 4 (noting that the Court of Appeals "remanded . . . for a possible evidentiary hearing on Harris' claim that the death penalty was being discriminatorily administered in California").[4] But the issue cannot be avoided much longer, as decisions of the lower federal courts are beginning to recognize. See, *e. g., Spencer* v. *Zant,* 715 F. 2d 1562, 1578–1583 (CA11 1983), rehearing en banc pending, No. 82–8408; *Ross* v. *Hopper,* 716 F. 2d 1528, 1539 (CA11 1983). See also *Stephens* v. *Kemp,* 464 U. S. 1027 (1983) (stay of execution granted pending rehearing en banc in *Spencer).*

Furthermore, the scholarly research necessary to support a claim of systemic racial discrimination is currently being pursued, and the results of that research are being compiled into a rapidly expanding body of literature. See, *e. g.,*

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[4] The Court of Appeals held, in a portion of its opinion not challenged before this Court, that "the district court should, if it becomes necessary, provide an opportunity to develop the factual basis and arguments concerning [Harris'] race-discrimination and gender-discrimination claims." 692 F. 2d 1189, 1197–1199 (CA9 1982). Harris is therefore entitled on remand to develop the evidence and arguments essential to an adequate review of these claims. At the same time, Harris made no showing in support of his wealth and age discrimination claims; the Court of Appeals therefore refused to require an evidentiary hearing or further consideration of these alleged bases for discrimination. *Id.,* at 1199.

D. Baldus, G. Woodworth, & C. Pulaski, The Differential Treatment of White and Black Victim Homicide Cases in Georgia's Capital Charging and Sentencing Process: Preliminary Findings (June 1982) (unpublished), reprinted in App. G to Pet. for Cert. in *Smith* v. *Balkcom*, O. T. 1981, No. 6978, Exh. E, Appendix D (discrimination by race of victim); Bowers & Pierce, Arbitrariness and Discrimination under Post-*Furman* Capital Statutes, 26 Crime & Delinquency 563 (1980) (discrimination by race of defendant and race of victim); L. Foley, Florida After the Furman Decision: Discrimination in the Processing of Capital Offense Cases (unpublished), reprinted in App. to Application for Stay in *Sullivan* v. *Wainwright*, O. T. 1983, No. A–409, Exh. 33 (discrimination by race of victim); Foley & Powell, The Discretion of Prosecutors, Judges, and Juries in Capital Cases, 7 Crim. Just. Rev. 16 (Fall 1982) (discrimination by race of victim); S. Gross & R. Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization (Oct. 1983) (unpublished), reprinted in App. to Application for Stay in *Sullivan* v. *Wainwright*, *supra*, Exh. 28 (discrimination by race of victim); Jacoby & Paternoster, Sentencing Disparity and Jury Packing: Further Challenges to the Death Penalty, 73 J. Crim. L. & Criminology 379 (1982) (discrimination by race of victim); Kleck, Racial Discrimination in Criminal Sentencing: A Critical Evaluation of the Evidence with Additional Evidence on the Death Penalty, 46 Am. Soc. Rev. 783 (1981); Radelet, Racial Characteristics and the Imposition of the Death Penalty, 46 Am. Soc. Rev. 918 (1981) (discrimination by race of victim); M. Radelet & G. Pierce, Race and Prosecutorial Discretion in Homicide Cases (1983) (presented at the Meetings of the American Sociological Association, Detroit, Mich., Sept. 4, 1983), reprinted in App. to Application for Stay in *Sullivan* v. *Wainwright*, *supra*, Exh. 34 (discrimination by race of defendant and race of victim); Riedel, Discrimination in the Imposition of the Death Penalty: A Comparison of the

Characteristics of Offenders Sentenced Pre-*Furman* and Post-*Furman*, 49 Temp. L. Q. 261 (1976); Zeisel, Race Bias in the Administration of the Death Penalty: The Florida Experience, 95 Harv. L. Rev. 456 (1981) (discrimination by race of defendant and race of victim). See also C. Black, Capital Punishment: The Inevitability of Caprice and Mistake (2d ed. 1981). Although research methods and techniques often differ, the conclusions being reached are relatively clear: factors crucial, yet without doubt impermissibly applied, to the imposition of the death penalty are the race of the defendant and the race of the victim.

Nor do I mean to suggest that racial discrimination is the only irrationality that infects the death penalty as it is currently being applied. Several of the studies cited above suggest that discrimination by gender, *e. g.*, Foley, *supra;* Foley & Powell, *supra*, by socioeconomic status, *e. g.*, Foley & Powell, *supra*, and by geographical location within a State, *e. g.*, Bowers & Pierce, *supra;* Foley & Powell, *supra*, may be common. I will not attempt at this time to expand upon the conclusions that these studies may dictate. But if the Court is going to fulfill its constitutional responsibilities, then it cannot sanction continued executions on the unexamined assumption that the death penalty is being administered in a rational, nonarbitrary, and noncapricious manner. Simply to assume that the procedural protections mandated by this Court's prior decisions eliminate the irrationality underlying application of the death penalty is to ignore the holding of *Furman* and whatever constitutional difficulties may be inherent in each State's death penalty system.

II

The question directly presented by this case is whether the Federal Constitution requires a court of statewide jurisdiction to undertake comparative proportionality review before a death sentence may be carried out. The results obtained by many States that undertake such proportionality review, pursuant to either state statute or judicial decision, convince me that this form of appellate review serves to eliminate some, if only a small part, of the irrationality that infects the current imposition of death sentences throughout the various States. To this extent, I believe that comparative proportionality review is mandated by the Constitution.

A

Some forms of irrationality that infect the administration of the death penalty—unlike discrimination by race, gender, socioeconomic status, or geographic location within a State—cannot be measured in any comprehensive way. That does not mean, however, that the process under which death sentences are currently being imposed is otherwise rational or acceptable. Rather, for any individual defendant the process is filled with so much unpredictability that "it smacks of little more than a lottery system," *Furman* v. *Georgia*, 408 U. S., at 293 (BRENNAN, J., concurring), under which being chosen for a death sentence remains as random as "being struck by lightning," *id.*, at 309 (Stewart, J., concurring).

Chief among the reasons for this unpredictability is the fact that similarly situated defendants, charged and convicted for similar crimes within the same State, often receive vastly different sentences. Professor John Kaplan of the Stanford Law School has summarized the dilemma:

> "The problem [of error in imposing capital punishment] is much more serious if we consider the chances of error in the system to be more than the execution of someone who is completely innocent—the ultimate horror case. Though examples of victims of mistaken identity are sometimes found on death row, the far more common cases fall into two types. In one, the recipient of the death penalty is guilty of a crime, but of a lesser offense, for which capital punishment is not in theory available. . . .
>
> "The second type of error in capital punishment occurs when we execute someone whose crime does not seem so

> aggravated when compared to those of many who escaped the death penalty. It is in this kind of case—which is extremely common—that we must worry whether, first, we have designed procedures which are appropriate to the decision between life and death and, second, whether we have followed those procedures." Kaplan, The Problem of Capital Punishment, 1983 U. Ill. L. Rev. 555, 576.

Comparative proportionality review is aimed at eliminating this second type of error.[5]

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[5] Perhaps the easiest evidence to assemble in order to highlight the comparative disproportionality between death sentences is to examine the cases proved against the 11 men who have been executed in the United States since 1976. Of those individuals, at least four refused to process appeals on their own behalf, preferring execution to a life in prison. Among the seven others were individuals convicted of the most heinous of crimes. But even among these men, there were still unexplained differences between their crimes which went unaccounted for in their sentences.

For example, Professor Kaplan has focused his comments on the execution of John Spinkellink (spelling of this name varies): "As I read the record, he was probably guilty of voluntary manslaughter, or at most second-degree murder. He was a drifter who killed another drifter who had sexually assaulted him. Although he received capital punishment in Florida, in California most district attorneys would probably have been happy to accept a plea to second-degree murder in such a case." Kaplan, 1983 U. Ill. L. Rev., at 576. See *Spinkellink* v. *Wainwright*, 578 F. 2d 582, 586, n. 3 (CA5 1978); *Spinkellink* v. *State*, 313 So. 2d 666, 668 (Fla. 1975). Justice Ervin of the Supreme Court of Florida, writing in dissent, explained the underlying facts that support Professor Kaplan's conclusions:

"In this case it appears that [Spinkellink] at the time of the homicide was a 24-year-old drifter who picked up Szymankiewicz, a hitchhiker. Both had criminal records and both were heavy drinkers. Szymankiewicz, the victim in this case, was a man of vicious propensities who boasted of killings and forced [Spinkellink] to have homosexual relations with him. [Spinkellink] discovered that Szymankiewicz had 'relieved him of his cash reserves.'

"It was under these conditions that [Spinkellink] returned to the motel room where the homicide occurred. [Spinkellink] testified he shot Szymankiewicz in self defense. Evidence to the contrary was only circumstantial. In fact, only through such evidence was it possible to infer the crime was premeditated and different from [Spinkellink's] direct testimony

B

Disproportionality among sentences given different defendants can only be eliminated after sentencing disparities are identified. And the most logical way to identify such sentencing disparities is for a court of statewide jurisdiction

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that he shot Szymankiewicz in self defense. The reasoning of this Court on the suddenness in which premeditation may be formed is suspect and allowed the prosecution undue latitude to readily shift from the theory of felony murder to premeditated murder.

"It does not appear to me that in this situation there was sufficient certainty of premeditated guilt and heinousness to warrant the death penalty. When the nature of the relation between [Spinkellink] and Szymankiewicz is taken into account, along with the viciousness of the victim's character and this theft of [Spinkellink's] money, it is obvious that hostility existed between them that could have produced a mortal encounter that involved self-defense shooting.

. . . . .

"Truly characterized, the sentencing to death here is an example of the exercise of local arbitrary discretion. The two actors in the homicide were underprivileged drifters. Their surnames, Spinkellink and Szymankiewicz, were foreign and strange to the Tallahassee area. They had no family roots or business connections here. All of the ingredients were present for the exercise of invidious parochial discrimination in the sentencing process which the plural opinions of the majority in *Furman* condemned. The result here is an old story, often repeated in this jurisdiction where the subconscious prejudices and local mores outweigh humane, civilized understanding when certain segments of the population are up for sentencing for murder." *Id.*, at 673–674.

Others characterize the December 1982 execution of Charles Brooks, Jr., as inexcusably aberrational. In particular, it is alleged that the prosecution in Brooks' case failed to prove whether he or his accomplice—one Woodrow Loudres, who eventually obtained a 40-year sentence in a plea bargain—fired the fatal shot. Indeed, before Brooks was executed, his prosecutor joined those seeking to stay his execution. See Goodpaster, Judicial Review of Death Sentences, 74 J. Crim. L. & Criminology 786, 786–787 (1983); Los Angeles Times, Dec. 6, 1982, p. 9, col. 1; Los Angeles Daily Journal, Dec. 8, 1982, p. 7, col. 1. See also *Brooks* v. *Estelle*, 459 U. S. 1061, 1063 (1982) (BRENNAN, MARSHALL, and STEVENS, JJ., dissenting from denial of stay); *Brooks* v. *Estelle*, 697 F. 2d 586, 588 (CA5 1982) *(per curiam).*

to conduct comparisons between death sentences imposed by different judges or juries within the State. This is what the Court labels comparative proportionality review. See *ante*, at 42–44. Although clearly no panacea, such review often serves to identify the most extreme examples of disproportionality among similarly situated defendants. At least to this extent, this form of appellate review serves to eliminate some of the irrationality that currently surrounds imposition of a death sentence. If only to further this limited purpose, therefore, I believe that the Constitution's prohibition on the irrational imposition of the death penalty requires that this procedural safeguard be provided.

Indeed, despite the Court's insistence that such review is not compelled by the Federal Constitution, over 30 States now require, either by statute or judicial decision, some form of comparative proportionality review before any death sentence may be carried out.[6] By itself, this should weigh heavily on the side of requiring such appellate review. Cf. *Enmund* v. *Florida*, 458 U. S. 782, 788–796 (1982); *Coker* v. *Georgia*, 433 U. S. 584, 593–596 (1977). In addition, these current practices establish beyond dispute that such review can be administered without much difficulty by a court of statewide jurisdiction in each State.

Perhaps the best evidence of the value of proportionality review can be gathered by examining the actual results obtained in those States which now require such review. For example, since 1973, the statute controlling appellate review of death sentences in the State of Georgia has required that the Supreme Court of Georgia determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Ga. Code Ann. § 17-10-35(c)(3) (1982). See *ante*, at 43, n. 7; *Gregg* v. *Georgia*, 428 U. S., at 166-168, 198, 204-206 (opinion of Stewart, POWELL, and STEVENS, JJ.). Pursuant to this statutory mandate, the Georgia Supreme Court has vacated at least seven death sentences because it was convinced that they were comparatively disproportionate. See, *e. g.*, *High* v. *State*, 247 Ga. 289, 297, 276 S. E. 2d 5, 14 (1981) (death sentence disproportionate for armed robbery and kidnaping); *Hall* v. *State*, 241 Ga. 252, 258-260, 244 S. E. 2d 833, 838-839 (1978) (death sentence disproportionate for felony murder when codefendant received life sentence in subsequent jury trial); *Ward* v. *State*, 239 Ga. 205, 208-209, 236 S. E. 2d 365, 368 (1977) (death sentence disproportionate for murder when defendant had received life sentence for same crime in previous trial); *Jarrell* v. *State*, 234 Ga. 410, 424-425, 216 S. E. 2d 258, 270 (1975) (death sentence disproportionate for armed robbery); *Floyd* v. *State*, 233 Ga. 280, 285, 210 S. E. 2d 810, 814 (1974) (same); *Gregg* v. *State*, 233 Ga. 117, 127, 210 S. E. 2d 659, 667 (1974) (same), aff'd on other grounds, 428 U. S. 153 (1976); *Coley* v. *State*, 231 Ga. 829, 835-836, 204 S. E. 2d 612, 616-617 (1974) (death sentence disproportionate for rape). Cf. *Hill* v. *State*, 237 Ga. 794, 802-803, 229 S. E. 2d 737, 743 (1976) (death sentence not disproportionate even though unclear which defendant actually committed murder; sentence later commuted to life imprisonment by Board of Pardons and Paroles).

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[6] For a complete list of these state statutes and decisions, see App. A to Brief for Respondent. See also Baldus, Pulaski, Woodworth, & Kyle, Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach, 33 Stan. L. Rev. 1, 2–3, n. 2 (1980); Goodpaster, *supra*, at 793, n. 61.

Although the Court today holds that the States are not constitutionally compelled to conduct comparative proportionality reviews, each State of course remains free to continue the practice.

Similarly, other States that require comparative proportionality review also have vacated death sentences for defendants whose crime or personal history did not justify such an extreme penalty. See, *e. g.*, *Henry* v. *State*, 278 Ark. 478, 488-489, 647 S. W. 2d 419, 425 (1983); *Sumlin* v. *State*, 273 Ark. 185, 190, 617 S. W. 2d 372, 375 (1981); *Blair* v.

State, 406 So. 2d 1103, 1109 (Fla. 1981); *McCaskill* v. *State*, 344 So. 2d 1276, 1278–1280 (Fla. 1977); *People* v. *Gleckler*, 82 Ill. 2d 145, 161–171, 411 N. E. 2d 849, 856–861 (1980); *Smith* v. *Commonwealth*, 634 S. W. 2d 411, 413–414 (Ky. 1982); *State* v. *Sonnier*, 380 So. 2d 1, 5–9 (La. 1979); *Coleman* v. *State*, 378 So. 2d 640, 649–650 (Miss. 1979); *State* v. *McIlvoy*, 629 S. W. 2d 333, 341–342 (Mo. 1982); *Munn* v. *State*, 658 P. 2d 482, 487–488 (Okla. Crim. App. 1983).[7]

What these cases clearly demonstrate, in my view, is that comparative proportionality review serves to eliminate some, if only a small part, of the irrationality that currently infects imposition of the death penalty by the various States. Before any execution is carried out, therefore, a State should be required under the Eighth and Fourteenth Amendments to conduct such appellate review. The Court's decision in *Furman*, and the Court's continuing emphasis on meaningful appellate review, see, *e. g.*, *ante*, p. 54 (STEVENS, J., concurring in part); *Barclay* v. *Florida*, 463 U. S., at 988–989 (MARSHALL, J., dissenting), require no less.

III

The Court today concludes that our prior decisions do not mandate that a comparative proportionality review be conducted before any execution takes place. Then, simply because the California statute provides both a list of "special circumstances" or "factors" that a jury must find before imposing a death sentence and judicial review of those findings, the Court upholds the California sentencing scheme. At no point does the Court determine whether comparative proportionality review should be required in order to ensure that the irrational, arbitrary, and capricious imposition of the death penalty invalidated by *Furman* does not still exist. Even if I did not adhere to my view that the death penalty is in all circumstances cruel and unusual punishment, I could not join in such unstudied decisionmaking.

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[7] Ironically, although the California death penalty statute reviewed in this case does not require comparative proportionality review, most other felony sentences in the State are subject to a mandatory, and highly complex, system of comparative review. See Cal. Penal Code Ann. § 1170(f) (West Supp. 1983) ("Within one year after the commencement of the term of imprisonment, the Board of Prison Terms shall review the sentence to determine whether the sentence is disparate in comparison with the sentences imposed in similar cases"). California therefore accords greater protection to felons who are imprisoned than to felons who may be executed.

I dissent.

MIGRA *v.* WARREN CITY SCHOOL DISTRICT BOARD OF EDUCATION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 82–738. Argued October 11, 1983—Decided January 23, 1984

Petitioner was employed by respondent Warren, Ohio, Board of Education (Board) as a supervisor of elementary education on an annual basis under written contracts. The Board, at a regularly scheduled meeting, adopted a resolution renewing petitioner's employment for the 1979–1980 school year, and, upon being advised of this, petitioner accepted the appointment by letter. But shortly thereafter, the Board, at a special meeting at which four of its five members were present, voted 3 to 1 not to renew petitioner's employment, and so notified her in writing. Petitioner then brought suit in the Ohio Court of Common Pleas against the Board and the three members who had voted not to renew her employment. The complaint alleged two causes of action—a breach of contract by the Board and wrongful interference by the individual members with petitioner's employment contract. The trial court held that petitioner's acceptance of the employment proffered for 1979–1980 created a binding contract and that the Board's subsequent action purporting not to renew the employment had no legal effect, and awarded petitioner reinstatement and compensatory damages. The court granted petitioner's motion to dismiss without prejudice "the issue of conspiracy and individual board member liability," which issue the court had previously "reserved and continued." The Ohio Court of Appeals affirmed, and review was denied by the Ohio Supreme Court. Thereafter, petitioner filed an action in Federal District Court under 42 U. S. C. § 1983 (1976 ed., Supp. V), *inter alia*, against the Board, its members, and the Superintendent of Schools, alleging that because of her activities involving a desegregation plan for the Warren elementary schools and a social studies curriculum that she had prepared, the Board members determined not to renew her contract, and that the Board's actions violated her rights under the First, Fifth, and Fourteenth Amendments. She requested injunctive relief and compensatory and punitive damages. The District Court granted summary judgment for the defendants on the basis of res judicata, *inter alia*, and dismissed the complaint. The United States Court of Appeals affirmed.

Held: With respect to petitioner's § 1983 claim, which was not litigated in state court, petitioner's state-court judgment has the same claim preclusive effect in federal court that the judgment would have in the Ohio state courts. Pp. 80–87.

(a) In the absence of federal law modifying the operation of 28 U. S. C. § 1738—which provides that state judicial proceedings shall have the same full faith and credit in every court within the United States as they have in the courts of the State from which they are taken—the preclusive effect in federal court of petitioner's state-court judgment is determined by Ohio law. Having rejected in *Allen* v. *McCurry*, 449 U. S. 90, the view that state-court judgments have no issue preclusive effect in § 1983 suits, this Court must also reject the view that § 1983 prevents petitioner's state-court judgment from creating a claim preclusive bar in this case. Section 1738 embodies the view that it is more important to give full faith and credit to state-court judgments than to ensure separate forums for federal and state claims. Section 1983 does not override state preclusion law and guarantee petitioner a right to proceed to judgment in state court on her state claims and then turn to federal court for adjudication of her federal claims. Pp. 80–85.

(b) The case is remanded for further proceedings. It appears that Ohio preclusion law has experienced a gradual evolution and that Ohio courts recently have applied preclusion concepts more broadly than in the past, but the District Court's opinion does not indicate whether it applied what it thought was the Ohio law of preclusion. It is the District Court, not this Court, that should, in the first instance, interpret Ohio preclusion law and apply it. Pp. 85–87.

703 F. 2d 564, vacated and remanded.

BLACKMUN, J., delivered the opinion for a unanimous Court. WHITE, J., filed a concurring opinion, in which BURGER, C. J., and POWELL, J., joined, *post*, p. 88.

John R. Vintilla argued the cause for petitioner. With him on the briefs was *Francis X. Cook*.

James L. Messenger argued the cause for respondents. With him on the briefs were *John C. Burkholder* and *Kimball H. Carey*.*

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *Charles S. Sims*, *Burt Neuborne*, *Gordon Beggs*, and *Barbara Besser;* for the Edwin F. Mandel Legal Aid Clinic by *Gary H. Palm;* and for the National Education Association by *Joy L. Koletsky* and *Robert H. Chanin*.

Stephen H. Sachs, Attorney General of Maryland, *Diana G. Motz* and *Frederick G. Savage*, Assistant Attorneys General, and *Sheldon Elliot*

JUSTICE BLACKMUN delivered the opinion of the Court.

This case raises issues concerning the claim preclusive effect[1] of a state-court judgment in the context of a subsequent suit, under 42 U. S. C. §§ 1983 and 1985 (1976 ed., Supp. V), in federal court.

I

Petitioner, Dr. Ethel D. Migra, was employed by the Warren (Ohio) City School District Board of Education from August 1976 to June 1979. She served as supervisor of elementary education. Her employment was on an annual basis under written contracts for successive school years.

Steinbach filed a brief for the State of Maryland et al. as *amici curiae* urging affirmance.

[1] The preclusive effects of former adjudication are discussed in varying and, at times, seemingly conflicting terminology, attributable to the evolution of preclusion concepts over the years. These effects are referred to collectively by most commentators as the doctrine of "res judicata." See Restatement (Second) of Judgments, Introductory Note before ch. 3 (1982); 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4402 (1981). Res judicata is often analyzed further to consist of two preclusion concepts: "issue preclusion" and "claim preclusion." Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided. See Restatement, *supra*, § 27. This effect also is referred to as direct or collateral estoppel. Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit. Claim preclusion therefore encompasses the law of merger and bar. See *id.*, Introductory Note before § 24.

This Court on more than one occasion has used the term "res judicata" in a narrow sense, so as to exclude issue preclusion or collateral estoppel. See, *e. g.*, *Allen* v. *McCurry*, 449 U. S. 90, 94 (1980); *Brown* v. *Felsen*, 442 U. S. 127 (1979). When using that formulation, "res judicata" becomes virtually synonymous with "claim preclusion." In order to avoid confusion resulting from the two uses of "res judicata," this opinion utilizes the term "claim preclusion" to refer to the preclusive effect of a judgment in foreclosing litigation of matters that should have been raised in an earlier suit. For a helpful explanation of preclusion vocabulary, see Wright et al., *supra*, § 4402.

On April 17, 1979, at a regularly scheduled meeting, the Board, with all five of its members present, unanimously adopted a resolution renewing Dr. Migra's employment as supervisor for the 1979–1980 school year. Being advised of this, she accepted the renewed appointment by letter dated April 18 delivered to a member of the Board on April 23. Early the following morning her letter was passed on to the Superintendent of Schools and to the Board's President.

The Board, however, held a special meeting, called by its President, on the morning of April 24. Although there appear to have been some irregularities about the call, see Brief for Respondents 19, n., four of the five members of the Board were present. The President first read Dr. Migra's acceptance letter. Then, after disposing of other business, a motion was made and adopted, by a vote of 3 to 1, not to renew petitioner's employment for the 1979–1980 school year. Dr. Migra was given written notice of this nonrenewal and never received a written contract of employment for that year. The Board's absent member, James Culver, learned of the special meeting and of Dr. Migra's termination after he returned from Florida on April 25 where he had attended a National School Boards Convention.

Petitioner brought suit in the Court of Common Pleas of Trumbull County, Ohio, against the Board and its three members who had voted not to renew her employment. The complaint, although in five counts, presented what the parties now accept as essentially two causes of action, namely, breach of contract by the Board, and wrongful interference by the individual members with petitioner's contract of employment. The state court, after a bench trial, "reserved and continued" the "issue of conspiracy" and did not reach the question of the individual members' liability. App. 39. It ruled that under Ohio law petitioner had accepted the employment proffered for 1979–1980, that this created a binding contract between her and the Board, and that the Board's subsequent action purporting not to renew the employment relationship had no legal effect. *Id.*, at 41–52. The court awarded Dr. Migra reinstatement to her position and compensatory damages. *Id.*, at 52. Thereafter, petitioner moved the state trial court to dismiss without prejudice "the issue of the conspiracy and individual board member liability." *Id.*, at 53. That motion was granted. *Id.*, at 54. The Ohio Court of Appeals, Eleventh District, in an unreported opinion, affirmed the judgment of the Court of Common Pleas. Review was denied by the Supreme Court of Ohio.[2]

In July 1980, Dr. Migra filed the present action in the United States District Court for the Northern District of Ohio against the Board, its then individual members, and the Superintendent of Schools. *Id.*, at 3. Her complaint alleged that she had become the director of a commission appointed by the Board to fashion a voluntary plan for the desegregation of the District's elementary schools; that she had prepared a social studies curriculum; that the individual defendants objected to and opposed the curriculum and resisted the desegregation plan; that hostility and ill will toward petitioner developed; and that, as a consequence, the individual defendants determined not to renew petitioner's contract of employment. *Id.*, at 5–6. Many of the alleged facts had been proved in the earlier state-court litigation. Dr. Migra claimed that the Board's actions were intended to punish her for the exercise of her First Amendment rights. She also claimed that the actions deprived her of property without due process and denied her equal protection. Her federal claim thus arose under the First, Fifth, and Fourteenth Amendments and 42 U. S. C. §§ 1983 and 1985 (1976 ed., Supp. V). She requested injunctive relief and compensatory and punitive damages. App. 11–12. Answers were filed in due course and shortly thereafter the defendants moved for summary judgment on the basis of res judicata and the bar of the statute of limitations. *Id.*, at 13–24.

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[2] It is apparent, from the foregoing recital of facts and of events that took place in the state-court litigation, that the cause of action for reinstatement and for damages was brought to a conclusion in the Ohio courts, but that the cause of action sounding in tort, that is, for wrongful interference with petitioner's contract of employment, was not. Instead, that cause of action was "reserved and continued," evidently by the state trial court *sua sponte*, and was eventually dismissed without prejudice upon petitioner's motion. This dismissal was subsequent to the entry of judgment on the breach-of-contract cause of action.

The District Court granted summary judgment for the defendants and dismissed the complaint. App. to Pet. for Cert. C–17—C–31, D–32. The United States Court of Appeals for the Sixth Circuit, by a short unreported order, affirmed. *Id.*, at A–15. See 703 F. 2d 564 (1982).[3] Because of the importance of the issue, and because of differences among the Courts of Appeals, see n. 6, *infra*, we granted certiorari. 459 U. S. 1102 (1983).

II

The Constitution's Full Faith and Credit Clause[4] is implemented by the federal full faith and credit statute, 28 U. S. C. § 1738. That statute reads in pertinent part:

> "Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

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[3] Respondents tell us that after petitioner's favorable judgment in the state court was affirmed by the Ohio Court of Appeals, with review denied by the Supreme Court of Ohio, the Board gave Dr. Migra backpay for the 1979–1980 school year reduced by the amount of unemployment compensation she had received for that period. Brief for Respondents 1–2; Tr. of Oral Arg. 23.

[4] "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U. S. Const., Art. IV, § 1.

It is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered. In *Allen* v. *McCurry*, 449 U. S. 90 (1980), this Court said:

> "Indeed, though the federal courts may look to the common law or to the policies supporting res judicata and collateral estoppel in assessing the preclusive effect of decisions of other federal courts, Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so. . . ." *Id.*, at 96.

This principle was restated in *Kremer* v. *Chemical Construction Corp.*, 456 U. S. 461 (1982):

> "Section 1738 requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged." *Id.*, at 466.

See also *Haring* v. *Prosise*, 462 U. S. 306 (1983). Accordingly, in the absence of federal law modifying the operation of § 1738, the preclusive effect in federal court of petitioner's state-court judgment is determined by Ohio law.

In *Allen*, the Court considered whether 42 U. S. C. § 1983 modified the operation of § 1738 so that a state-court judgment was to receive less than normal preclusive effect in a suit brought in federal court under § 1983. In that case, the respondent had been convicted in a state-court criminal proceeding. In that proceeding, the respondent sought to suppress certain evidence against him on the ground that it had been obtained in violation of the Fourth Amendment. The trial court denied the motion to suppress. The respondent then brought a § 1983 suit in federal court against the officers who had seized the evidence. The District Court held the suit barred by collateral estoppel (issue preclusion) because the issue of a Fourth Amendment violation had been resolved against the respondent by the denial of his suppression motion in the criminal trial. The Court of Appeals reversed. That court concluded that, because a § 1983 suit was the respondent's only route to a federal forum for his constitutional claim,[5] and because one of § 1983's underlying purposes was to provide a federal cause of action in situations where state courts were not adequately protecting individual rights, the respondent should be allowed to proceed to trial in federal court unencumbered by collateral estoppel. This Court, however, reversed the Court of Appeals, explaining:

> "[N]othing in the language of § 1983 remotely expresses any congressional intent to contravene the common-law rules of preclusion or to repeal the express statutory requirements of the predecessor of 28 U. S. C. § 1738 . . . . Section 1983 creates a new federal cause of action. It says nothing about the preclusive effect of state-court judgments.
>
> "Moreover, the legislative history of § 1983 does not in any clear way suggest that Congress intended to repeal or restrict the traditional doctrines of preclusion. . . . [T]he legislative history as a whole . . . lends only the most equivocal support to any argument that, in cases where the state courts have recognized the constitutional claims asserted and provided fair procedures for determining them, Congress intended to override § 1738 or the common-law rules of collateral estoppel and res judicata. Since repeals by implication are disfavored . . . much clearer support than this would be required to hold that § 1738 and the traditional rules of preclusion are not applicable to § 1983 suits." 449 U. S., at 97–99.

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[5] The respondent had not asserted that the state courts had denied him a "full and fair opportunity" to litigate his search and seizure claim; he therefore was barred by *Stone* v. *Powell*, 428 U. S. 465 (1976), from seeking a writ of habeas corpus in federal district court.

Allen therefore made clear that issues actually litigated in a state-court proceeding are entitled to the same preclusive effect in a subsequent federal § 1983 suit as they enjoy in the courts of the State where the judgment was rendered.

The Court in *Allen* left open the possibility, however, that the preclusive effect of a state-court judgment might be different as to a federal issue that a § 1983 litigant could have raised but did not raise in the earlier state-court proceeding.[6] 449 U. S., at 97, n. 10. That is the central issue to be resolved in the present case. Petitioner did not litigate her § 1983 claim in state court, and she asserts that the state-court judgment should not preclude her suit in federal court simply because her federal claim could have been litigated in the state-court proceeding. Thus, petitioner urges this Court to interpret the interplay of § 1738 and § 1983 in such a way as to accord state-court judgments preclusive effect in § 1983 suits only as to issues actually litigated in state court.

It is difficult to see how the policy concerns underlying § 1983 would justify a distinction between the issue preclusive and claim preclusive effects of state-court judgments. The argument that state-court judgments should have less preclusive effect in § 1983 suits than in other federal suits is based on Congress' expressed concern over the adequacy of state courts as protectors of federal rights. See, *e. g.*, *Mitchum* v. *Foster*, 407 U. S. 225, 241–242 (1972). *Allen* recognized that the enactment of § 1983 was motivated partially out of such concern, 449 U. S., at 98–99, but *Allen* nevertheless held that § 1983 did not open the way to relitigation of an issue that had been determined in a state criminal proceeding. Any distrust of state courts that would justify a limitation on the preclusive effect of state judgments in § 1983 suits would presumably apply equally to issues that actually were decided in a state court as well as to those that could have been. If § 1983 created an exception to the general preclusive effect accorded to state-court judgments, such an exception would seem to require similar treatment of both issue preclusion and claim preclusion. Having rejected in *Allen* the view that state-court judgments have no issue preclusive effect in § 1983 suits, we must reject the view that § 1983 prevents the judgment in petitioner's state-court proceeding from creating a claim preclusion bar in this case.

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[6] Most federal courts that have faced this question have ruled that claim preclusion is applicable to a § 1983 action. See *Isaac* v. *Schwartz*, 706 F. 2d 15 (CA1 1983); *Nilsen* v. *City of Moss Point*, 701 F. 2d 556 (CA5 1983); *Castorr* v. *Brundage*, 674 F. 2d 531 (CA6), cert. denied, 459 U. S. 928 (1982); *Lee* v. *City of Peoria*, 685 F. 2d 196 (CA7 1982); *Robbins* v. *District Court of Worth County, Iowa*, 592 F. 2d 1015 (CA8), cert. denied, 444 U. S. 852 (1979); *Scoggin* v. *Schrunk*, 522 F. 2d 436 (CA9 1975), cert. denied, 423 U. S. 1066 (1976); *Spence* v. *Latting*, 512 F. 2d 93 (CA10), cert. denied, 423 U. S. 896 (1975). Some appear to have decided otherwise. See *Lombard* v. *Board of Ed. of City of New York*, 502 F. 2d 631 (CA2 1974), cert. denied, 420 U. S. 976 (1975); *New Jersey Education Assn.* v. *Burke*, 579 F. 2d 764 (CA3), cert. denied, 439 U. S. 894 (1978).

For comment as to federal-state comity considerations, see Currie, Res Judicata: The Neglected Defense, 45 U. Chi. L. Rev. 317 (1978).

Petitioner suggests that to give state-court judgments full issue preclusive effect but not claim preclusive effect would enable litigants to bring their state claims in state court and their federal claims in federal court, thereby taking advantage of the relative expertise of both forums. Although such a division may seem attractive from a plaintiff's perspective, it is not the system established by § 1738. That statute embodies the view that it is more important to give full faith and credit to state-court judgments than to ensure separate forums for federal and state claims. This reflects a variety of concerns, including notions of comity, the need to prevent vexatious litigation, and a desire to conserve judicial resources.

In the present litigation, petitioner does not claim that the state court would not have adjudicated her federal claims had she presented them in her original suit in state court. Alternatively, petitioner could have obtained a federal forum for her federal claim by litigating it first in a federal court.[7] Section 1983, however, does not override state preclusion law and guarantee petitioner a right to proceed to judgment in state court on her state claims and then turn to federal court for adjudication of her federal claims. We hold, therefore, that petitioner's state-court judgment in this litigation has the same claim preclusive effect in federal court that the judgment would have in the Ohio state courts.

III

It appears to us that preclusion law in Ohio has experienced a gradual evolution, and that Ohio courts recently have applied preclusion concepts more broadly than in the past. For example, in *Vasu* v. *Kohlers, Inc.*, 145 Ohio St. 321, 61 N. E. 2d 707 (1945), a plaintiff who suffered both personal injury and property damages in an automobile accident was held entitled to maintain a separate suit against the defendant for each type of injury. The theory was that "[i]njuries to both person and property suffered by the same person as a result of the same wrongful act are infringements of different rights and give rise to distinct causes of action . . . ." *Id.*, at

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[7] The author of this opinion was in dissent in *Allen.* The rationale of that dissent, however, was based largely on the fact that the § 1983 plaintiff in that case first litigated his constitutional claim in state court in the posture of his being a *defendant* in a criminal proceeding. See 449 U. S., at 115–116. In this case, petitioner was in an offensive posture in her state-court proceeding, and could have proceeded first in federal court had she wanted to litigate her federal claim in a federal forum.

In the event that a § 1983 plaintiff's federal and state-law claims are sufficiently intertwined that the federal court abstains from passing on the federal claims without first allowing the state court to address the state-law issues, the plaintiff can preserve his right to a federal forum for his federal claims by informing the state court of his intention to return to federal court on his federal claims following litigation of his state claims in state court. See, *e. g.*, *England* v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411 (1964).

321, 61 N. E. 2d, at 709 (syllabus ¶4).[8] In *Rush* v. *Maple Heights*, 167 Ohio St. 221, 147 N. E. 2d 599 (1958), however, the Supreme Court of Ohio specifically overruled "[p]aragraph four of the syllabus in the *[Vasu]* case." *Id.*, at 221, 235, 147 N. E. 2d, at 599, 607. The new approach was declared to be more in accord with "modern practice," *id.*, at 235, 147 N. E. 2d, at 607, and was adopted in the hope that it might reduce "much of the vexatious litigation, with its attendant confusion, which has resulted in recent years from the filing of separate petitions by the same plaintiff, one for personal injuries and one for property damage although sustained simultaneously." *Id.*, at 234–235, 147 N. E. 2d, at 607.

This holding, of course, did not fully solve for the Ohio law the question as to what constitutes a "cause of action" for claim preclusion purposes. The definition of "cause of action" or "claim" is critical in the present context because it seems that a basic rule of Ohio law is that a person is entitled to one lawsuit for each "cause of action" he possesses. *Norwood* v. *McDonald*, 142 Ohio St. 299, 52 N. E. 2d 67 (1943); *Whitehead* v. *General Tel. Co.*, 20 Ohio St. 2d 108, 254 N. E. 2d 10 (1969).

In 1968, the Supreme Court of Ohio twice dealt with the question of what constitutes a cause of action for preclusion purposes. *Henderson* v. *Ryan*, 13 Ohio St. 2d 31, 233 N. E. 2d 506; *Sharp* v. *Shelby Mut. Ins. Co.*, 15 Ohio St. 2d 134, 239 N. E. 2d 49. In each of these cases, although a second action against the defendant was permitted, the court clearly was developing a broader and more expansive attitude toward claim preclusion. See *Henderson*, 13 Ohio St. 2d, at 35, 38, 233 N. E. 2d, at 509–511; *Sharp*, 15 Ohio St. 2d, at 140, 239 N. E. 2d, at 54. In addition, the Ohio Supreme

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[8] Except for *per curiam* opinions, the Ohio Supreme Court speaks as a court only through the syllabi of its cases. *Cassidy* v. *Glossip*, 12 Ohio St. 2d 17, 18, 24, 231 N. E. 2d 64, 65, 68 (1967). See *Ohio* v. *Gallagher*, 425 U. S. 257, 259 (1976); *Beck* v. *Ohio*, 379 U. S. 89, 93, and n. 2 (1964); *Perkins* v. *Benguet Mining Co.*, 342 U. S. 437, 441, and n. 3 (1952).

Court in 1970 adopted Rule 13 of the Ohio Rules of Civil Procedure establishing a compulsory counterclaim provision like its federal counterpart in Rule 13 of the Federal Rules of Civil Procedure.

Then, in 1982, the Supreme Court of Ohio adopted what appears to be a broad doctrine of preclusion indeed, although in a defensive, not offensive, context. *Johnson's Island, Inc.* v. *Board of Township Trustees*, 69 Ohio St. 2d 241, 431 N. E. 2d 672. The first syllabus by the court recites:

> "When in a prior injunction action brought to enjoin the defendant landowner's violation of a zoning law, the defendant asserts the affirmative defense of nonconforming use, but does not assert the unconstitutionality of the law, the landowner is, on the principle of *res judicata*, barred from later bringing a declaratory judgment action alleging such law to be unconstitutional." *Ibid.*, 431 N. E. 2d, at 673.

See also *Stromberg* v. *Board of Ed. of Bratenahl*, 64 Ohio St. 2d 98, 413 N. E. 2d 1184 (1980).

In reading the opinion of the District Court in the present litigation, we are unable to determine whether that court was applying what it thought was the Ohio law of preclusion. The opinion cites a Sixth Circuit opinion that purported to enunciate Ohio law, *Coogan* v. *Cincinnati Bar Assn.*, 431 F. 2d 1209 (1970), and also relied on precedents from other Federal Courts of Appeals applying both federal and state law. Our holding today makes clear that Ohio state preclusion law is to be applied to this case. Prudence also dictates that it is the District Court, in the first instance, not this Court, that should interpret Ohio preclusion law and apply it.

The judgment of the Court of Appeals, accordingly, is vacated, and the case is remanded to that court so that it may instruct the District Court to conduct such further proceedings as are required by, and are consistent with, this opinion.

It is so ordered.

JUSTICE WHITE, with whom THE CHIEF JUSTICE and JUSTICE POWELL join, concurring.

In *Union & Planters' Bank* v. *Memphis*, 189 U. S. 71, 75 (1903), this Court held that a federal court "can accord [a state judgment] no greater efficacy" than would the judgment-rendering State. That holding has been adhered to on at least three occasions since that time. *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 309 U. S. 4, 7–8 (1940); *Wright* v. *Georgia Railroad & Banking Co.*, 216 U. S. 420, 429 (1910); *City of Covington* v. *First National Bank*, 198 U. S. 100, 107–109 (1905). The Court has also indicated that the States are bound by a similar rule under the Full Faith and Credit Clause. *Public Works* v. *Columbia College*, 17 Wall. 521, 529 (1873). The Court is thus justified in this case to rule that preclusion must be determined under state law, even if there would be preclusion under federal standards.

This construction of 28 U. S. C. § 1738 and its predecessors is unfortunate. In terms of the purpose of that section, which is to require federal courts to give effect to state-court judgments, there is no reason to hold that a federal court may not give preclusive effect to a state judgment simply because the judgment would not bar relitigation in the state courts. If the federal courts have developed rules of res judicata and collateral estoppel that prevent relitigation in circumstances that would not be preclusive in state courts, the federal courts should be free to apply them, the parties then being free to relitigate in the state courts. The contrary construction of § 1738 is nevertheless one of long standing, and Congress has not seen fit to disturb it, however justified such an action might have been.

Accordingly, I join the opinion of the Court.

PENNHURST STATE SCHOOL AND HOSPITAL ET AL. *v.* HALDERMAN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 81–2101. Argued February 22, 1983—Reargued October 3, 1983—Decided January 23, 1984

Respondent Halderman, a resident of petitioner Pennhurst State School and Hospital, a Pennsylvania institution for the care of the mentally retarded, brought a class action in Federal District Court against Pennhurst, certain of its officials, the Pennsylvania Department of Public Welfare, and various state and county officials (also petitioners). It was alleged that conditions at Pennhurst violated various federal constitutional and statutory rights of the class members as well as their rights under the Pennsylvania Mental Health and Mental Retardation Act of 1966 (MH/MR Act). Ultimately, the District Court awarded injunctive relief based in part on the MH/MR Act, which was held to provide a right to adequate habilitation. The Court of Appeals affirmed, holding that the MH/MR Act required the State to adopt the "least restrictive environment" approach for the care of the mentally retarded, and rejecting petitioners' argument that the Eleventh Amendment barred a federal court from considering this pendent state-law claim. The court reasoned that since that Amendment did not bar a federal court from granting prospective injunctive relief against state officials on the basis of federal claims, citing *Ex parte Young*, 209 U. S. 123, the same result obtained with respect to a pendent state-law claim.

Held: The Eleventh Amendment prohibited the District Court from ordering state officials to conform their conduct to state law. Pp. 97–124.

(a) The principle of sovereign immunity is a constitutional limitation on the federal judicial power established in Art. III of the Constitution. The Eleventh Amendment bars a suit against state officials when the State is the real, substantial party in interest, regardless of whether the suit seeks damages or injunctive relief. The Court in *Ex parte Young*, *supra*, recognized an important exception to this general rule: a suit challenging the federal constitutionality of a state official's action is not one against the State. Pp. 97–103.

(b) In *Edelman* v. *Jordan*, 415 U. S. 651, this Court recognized that the need to promote the supremacy of federal law that is the basis of *Young* must be accommodated to the constitutional immunity of the States. Thus, the Court declined to extend the *Young* doctrine to encompass retroactive relief, for to do so would effectively eliminate the States' constitutional immunity. *Edelman*'s distinction between prospective and retroactive relief fulfilled *Young*'s underlying purpose of vindicating the supreme authority of federal law while at the same time preserving to an important degree the States' constitutional immunity. But this need to reconcile competing interests is wholly absent when a plaintiff alleges that a state official has violated *state* law. In such a case the entire basis for the doctrine of *Young* and *Edelman* disappears. A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. When a federal court instructs state officials on how to conform their conduct to state law, this conflicts directly with the principles of federalism that underlie the Eleventh Amendment. Pp. 103–106.

(c) The dissenters' view is that an allegation that official conduct is contrary to a state statute would suffice to override the State's protection from injunctive relief under the Eleventh Amendment because such conduct is ultra vires the official's authority. This view rests on fiction, is wrong on the law, and would emasculate the Eleventh Amendment. At least insofar as injunctive relief is sought, an error of law by state officers acting in their official capacity will not suffice to override the sovereign immunity of the State where the relief effectively is against it. *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682. Under the dissenters' view, the ultra vires doctrine, a narrow and questionable exception, would swallow the general rule that a suit is against the State if the relief will run against it. Pp. 106–117.

(d) The principle that a claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is protected by the Eleventh Amendment applies as well to state-law claims brought into federal court under pendent jurisdiction. Pp. 117–121.

(e) While it may be that applying the Eleventh Amendment to pendent state-law claims results in federal claims being brought in state court or in bifurcation of claims, such considerations of policy cannot override the constitutional limitation on the authority of the federal judiciary to adjudicate suits against a State. Pp. 121–123.

(f) The judgment below cannot be sustained on the basis of the state-law obligation of petitioner county officials, since any relief granted against these officials on the basis of the MH/MR Act would be partial and incomplete at best. Such an ineffective enforcement of state law would not appear to serve the purposes of efficiency, convenience, and fairness that must inform the exercise of pendent jurisdiction. Pp. 123–124.

673 F. 2d 647, reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which **BURGER**, C. J., and **WHITE**, **REHNQUIST**, and **O'CONNOR**, JJ., joined. **BRENNAN**, J., filed a dissenting opinion, *post*, p. 125. **STEVENS**, J., filed a dissenting opinion, in which **BRENNAN**, **MARSHALL**, and **BLACKMUN**, JJ., joined, *post*, p. 126.

H. Bartow Farr III and *Allen C. Warshaw* reargued the cause for petitioners. With them on the briefs were *Thomas M. Kittredge*, *Joel I. Klein*, *LeRoy S. Zimmerman*, *Robert B. Hoffman*, *Debra K. Wallet*, *Alan J. Davis*, and *Mark A. Aronchick*.

David Ferleger reargued the cause and filed a brief for respondents Halderman et al. *Thomas K. Gilhool* reargued the cause for respondents Pennsylvania Association for Retarded Citizens et al. With him on the brief were *Frank J. Laski* and *Michael Churchill*. *Solicitor General Lee*, *Assistant Attorney General Reynolds*, *Deputy Assistant Attorneys General Cooper* and *Wilkinson*, *Brian K. Landsberg*, and *Frank Allen* filed a brief for the United States.*

JUSTICE POWELL delivered the opinion of the Court.

This case presents the question whether a federal court may award injunctive relief against state officials on the basis of state law.

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*A brief of *amici curiae* was filed for the State of Alabama et al. by *Francis X. Bellotti*, Attorney General of Massachusetts, *Thomas R. Kiley*, First Assistant Attorney General, and *Carl Valvo*, *William L. Pardee*, and *Judith S. Yogman*, Assistant Attorneys General, joined by the Attorneys General for their respective jurisdictions as follows: *Charles A. Graddick* of Alabama, *Robert K. Corbin* of Arizona (by *Anthony Ching*, Solicitor General), *J. D. MacFarlane* of Colorado, *Carl R. Ajello* of Connecticut, *Richard S. Gebelein* of Delaware, *Michael J. Bowers* of Georgia, *Tyrone C. Fahner* of Illinois, *Linley E. Pearson* of Indiana, *Thomas J. Miller* of Iowa, *Steven L. Beshear* of Kentucky, *Frank J. Kelley* of Michigan, *John D. Ashcroft* of Missouri, *Paul L. Douglas* of Nebraska, *Richard H. Bryan* of Nevada, *Gregory H. Smith* of New Hampshire, *Irwin I. Kimmelman* of New Jersey, *Rufus L. Edmisten* of North Carolina, *Robert O. Wefald* of North Dakota, *Hector Reichard* of Puerto Rico, *David L. Wilkinson* of Utah, *Bronson C. La Follette* of Wisconsin, *Steven Freudenthal* of Wyoming, and *Aviata F. Fa'Aleveo* of American Samoa.

I

This litigation, here for the second time, concerns the conditions of care at petitioner Pennhurst State School and Hospital, a Pennsylvania institution for the care of the mentally retarded. See *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1 (1981). Although the litigation's history is set forth in detail in our prior opinion, see *id.*, at 5–10, it is necessary for purposes of this decision to review that history.

This suit originally was brought in 1974 by respondent Terri Lee Halderman, a resident of Pennhurst, in the District Court for the Eastern District of Pennsylvania. Ultimately, plaintiffs included a class consisting of all persons who were or might become residents of Pennhurst; the Pennsylvania Association for Retarded Citizens (PARC); and the United States. Defendants were Pennhurst and various Pennhurst officials; the Pennsylvania Department of Public Welfare and several of its officials; and various county commissioners, county mental retardation administrators, and other officials of five Pennsylvania counties surrounding Pennhurst. Respondents' amended complaint charged that conditions at Pennhurst violated the class members' rights under the Eighth and Fourteenth Amendments; § 504 of the Rehabilitation Act of 1973, 87 Stat. 394, 29 U. S. C. § 794; the Developmentally Disabled Assistance and Bill of Rights Act, 89 Stat. 496, 42 U. S. C. § 6001 *et seq.*; and the Pennsylvania Mental Health and Mental Retardation Act of 1966 (MH/MR Act), Pa. Stat. Ann., Tit. 50, §§ 4101–4704 (Purdon 1969 and Supp. 1983–1984). Both damages and injunctive relief were sought.

In 1977, following a lengthy trial, the District Court rendered its decision. *Halderman* v. *Pennhurst State School and Hospital*, 446 F. Supp. 1295. As noted in our prior opinion, the court's findings were undisputed: "Conditions at Pennhurst are not only dangerous, with the residents often physically abused or drugged by staff members, but also inadequate for the 'habilitation' of the retarded. Indeed, the court found that the physicial, intellectual, and emotional skills of some residents have deteriorated at Pennhurst." 451 U. S., at 7 (footnote omitted). The District Court held that these conditions violated each resident's right to "minimally adequate habilitation" under the Due Process Clause and the MH/MR Act, see 446 F. Supp., at 1314–1318, 1322–1323; "freedom from harm" under the Eighth and Fourteenth Amendments, see *id.*, at 1320–1321; and "nondiscriminatory habilitation" under the Equal Protection Clause and § 504 of the Rehabilitation Act, see *id.*, at 1321–1324. Furthermore, the court found that "due process demands that if a state undertakes the habilitation of a retarded person, it must do so in the *least restrictive setting* consistent with that individual's habilitative needs." *Id.*, at 1319 (emphasis added). After concluding that the large size of Pennhurst prevented it from providing the necessary habilitation in the least restrictive environment, the court ordered that "immediate steps be taken to remove the retarded residents from Pennhurst." *Id.*, at 1325. Petitioners were ordered "to provide suitable community living arrangements" for the class members, *id.*, at 1326, and the court appointed a Special Master "with the power and duty to plan, organize, direct, supervise and monitor the implementation of this and any further Orders of the Court." *Ibid.*[1]

The Court of Appeals for the Third Circuit affirmed most of the District Court's judgment. *Halderman* v. *Pennhurst State School and Hospital*, 612 F. 2d 84 (1979) (en banc). It agreed that respondents had a right to habilitation in the least restrictive environment, but it grounded this right solely on the "bill of rights" provision in the Developmentally Disabled Assistance and Bill of Rights Act, 42 U. S. C. § 6010. See 612 F. 2d, at 95–100, 104–107. The court did not consider the constitutional issues or § 504 of the Rehabilitation Act, and while it affirmed the District Court's holding that the MH/MR Act provides a right to adequate habilitation, see *id.*, at 100–103, the court did not decide whether that state right encompassed a right to treatment in the least restrictive setting.

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[1] The District Court determined that the individual defendants had acted in good faith and therefore were immune from the damages claims. 446 F. Supp., at 1324.

On the question of remedy, the Court of Appeals affirmed except as to the District Court's order that Pennhurst be closed. The court observed that some patients would be unable to adjust to life outside an institution, and it determined that none of the legal provisions relied on by respondents precluded institutionalization. *Id.*, at 114–115. It therefore remanded for "individual determinations by the [District Court], or by the Special Master, as to the appropriateness of an improved Pennhurst for each such patient," guided by "a presumption in favor of placing individuals in [community living arrangements]." *Ibid.*[2]

On remand the District Court established detailed procedures for determining the proper residential placement for each patient. A team consisting of the patient, his parents or guardian, and his case manager must establish an individual habilitation plan providing for habilitation of the patient in a designated community living arrangement. The plan is subject to review by the Special Master. A second master, called the Hearing Master, is available to conduct hearings, upon request by the resident, his parents, or his advocate, on the question whether the services of Pennhurst would be more beneficial to the resident than the community living arrangement provided in the resident's plan. The Hearing Master then determines where the patient should reside, subject to possible review by the District Court. See App. 123a–134a (Order of Apr. 24, 1980).[3]

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[2] In a companion case, the Court of Appeals affirmed the District Court's denial of the Pennhurst Parents-Staff Association's motion to intervene for purposes of appeal, finding the denial harmless error. See *Halderman* v. *Pennhurst State School and Hospital*, 612 F. 2d 131 (1979) (en banc). The Association subsequently was granted leave to intervene and is a petitioner in this Court.

This Court reversed the judgment of the Court of Appeals, finding that 42 U. S. C. § 6010 did not create any substantive rights. *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1 (1981). We remanded the case to the Court of Appeals to determine if the remedial order could be supported on the basis of state law, the Constitution, or § 504 of the Rehabilitation Act. See *id.*, at 31.[4] We also remanded for consideration of whether any relief was available under other provisions of the Developmentally Disabled Assistance and Bill of Rights Act. See *id.*, at 27–30 (discussing 42 U. S. C. §§ 6011(a), 6063(b)(5) (1976 ed., Supp. V)).

On remand the Court of Appeals affirmed its prior judgment in its entirety. 673 F. 2d 647 (1982) (en banc). It determined that in a recent decision the Supreme Court of Pennsylvania had "spoken definitively" in holding that the MH/MR Act required the State to adopt the "least restrictive environment" approach for the care of the mentally retarded. *Id.*, at 651 (citing *In re Schmidt*, 494 Pa. 86, 429 A. 2d 631 (1981)). The Court of Appeals concluded that this state statute fully supported its prior judgment, and therefore did not reach the remaining issues of federal law. It also rejected petitioners' argument that the Eleventh Amendment barred a federal court from considering this pendent state-law claim. The court noted that the Amendment did not bar a federal court from granting prospective injunctive relief against state officials on the basis of federal claims, see 673 F. 2d, at 656 (citing *Ex parte Young*, 209 U. S. 123 (1908)), and concluded that the same result obtained with respect to a pendent state-law claim. It reasoned that because *Siler* v. *Louisville & Nashville R. Co.*, 213 U. S. 175 (1909), an important case in the development of the doctrine of pendent jurisdiction, also involved state officials, "there cannot be . . . an Eleventh Amendment exception to that rule." 673 F. 2d, at 658.[5] Finally, the court rejected petitioners' argument that it should have abstained from deciding the state-law claim under principles of comity, see *id.*, at 659–660, and refused to consider petitioners' objections to the District Court's use of a Special Master, see *id.*, at 651, and n. 10. Three judges dissented in part, arguing that under principles of federalism and comity the establishment of a Special Master to supervise compliance was an abuse of discretion. See *id.*, at 662 (Seitz, C. J., joined by Hunter, J., dissenting in part); *ibid.* (Garth, J., concurring in part and dissenting as to relief). See also *id.*, at 661 (Aldisert, J., concurring) (seriously questioning the propriety of the order appointing the Special

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[3] On July 1, 1981, Pennsylvania enacted an appropriations bill providing that only $35,000 would be paid for the Masters' expenses for the fiscal year July 1981 to June 1982. The District Court held the Pennsylvania Department of Public Welfare and its Secretary in contempt, and imposed a fine of $10,000 per day. Pennsylvania paid the fines, and the contempt was purged on January 8, 1982. On appeal the Court of Appeals affirmed the contempt order. *Halderman* v. *Pennhurst State School and Hospital*, 673 F. 2d 628 (1982), cert. pending, No. 81–2363.

[4] Three Justices dissented from the Court's construction of the Act, but concluded that the District Court should not have adopted the "far-reaching remedy" of appointing "a Special Master to decide which of the Pennhurst inmates should remain and which should be moved to community-based facilities. . . . [T]he court should not have assumed the task of managing Pennhurst . . . ." 451 U. S., at 54 (WHITE J., joined by BRENNAN and MARSHALL, JJ., dissenting in part).

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[5] The Court of Appeals also noted that "the United States is an intervening plaintiff . . . against which even the state itself cannot successfully plead the Eleventh Amendment as a bar to jurisdiction," and that "the counties, even as juridical entities, do not fall within the coverage of the Eleventh Amendment. Against those defendants even money damages may be awarded." 673 F. 2d, at 656 (citation omitted).

As JUSTICE BRENNAN notes in his dissent, *post*, at 126, Judge Gibbons has expanded on his views of the Eleventh Amendment in a recent law review article. Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 Colum. L. Rev. 1889 (1983). Judge Gibbons was the author of both the first and second opinions by the Court of Appeals in this case.

Master, but concluding that a retroactive reversal of that order would be meaningless).[6]

We granted certiorari, 457 U. S. 1131 (1982), and now reverse and remand.

II

Petitioners raise three challenges to the judgment of the Court of Appeals: (i) the Eleventh Amendment prohibited the District Court from ordering state officials to conform their conduct to state law; (ii) the doctrine of comity prohibited the District Court from issuing its injunctive relief; and (iii) the District Court abused its discretion in appointing two Masters to supervise the decisions of state officials in implementing state law. We need not reach the latter two issues, for we find the Eleventh Amendment challenge dispositive.

A

Article III, §2, of the Constitution provides that the federal judicial power extends, *inter alia,* to controversies "between a State and Citizens of another State." Relying on this language, this Court in 1793 assumed original jurisdiction over a suit brought by a citizen of South Carolina against the State of Georgia. *Chisholm* v. *Georgia,* 2 Dall. 419 (1793). The decision "created such a shock of surprise that the Eleventh Amendment was at once proposed and adopted." *Monaco* v. *Mississippi,* 292 U. S. 313, 325 (1934). The Amendment provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

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[6] The Office of the Special Master was abolished in December 1982. See App. 220a (Order of Aug. 12, 1982). The Hearing Master remains in operation.

The Amendment's language overruled the particular result in *Chisholm*, but this Court has recognized that its greater significance lies in its affirmation that the fundamental principle of sovereign immunity limits the grant of judicial authority in Art. III. Thus, in *Hans* v. *Louisiana*, 134 U. S. 1 (1890), the Court held that, despite the limited terms of the Eleventh Amendment, a federal court could not entertain a suit brought by a citizen against his own State. After reviewing the constitutional debates concerning the scope of Art. III, the Court determined that federal jurisdiction over suits against unconsenting States "was not contemplated by the Constitution when establishing the judicial power of the United States." *Id.*, at 15. See *Monaco* v. *Mississippi*, *supra*, at 322–323.[7] In short, the principle of sovereign immunity is a constitutional limitation on the federal judicial power established in Art. III:

> "That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that *the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given:* not one brought by citizens of another State, or by citizens or subjects of a foreign State, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but

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[7] See *Employees* v. *Missouri Dept. of Public Health and Welfare*, 411 U. S. 279, 291–292 (1973) (MARSHALL, J., concurring in result) (The Eleventh Amendment "clarif[ied] the intent of the Framers concerning the reach of the federal judicial power" and "restore[d] the original understanding" that States could not be made unwilling defendants in federal court). See also *Nevada* v. *Hall*, 440 U. S. 410, 430–431 (1979) (BLACKMUN, J., dissenting); *id.*, at 437 (REHNQUIST, J., dissenting).

an exemplification." *Ex parte State of New York*, 256 U. S. 490, 497 (1921) (emphasis added).[8]

A sovereign's immunity may be waived, and the Court consistently has held that a State may consent to suit against it in federal court. See, *e. g.*, *Clark* v. *Barnard*, 108 U. S. 436, 447 (1883). We have insisted, however, that the State's consent be unequivocally expressed. See, *e. g.*, *Edelman* v. *Jordan*, 415 U. S. 651, 673 (1974). Similarly, although Congress has power with respect to the rights protected by the Fourteenth Amendment to abrogate the Eleventh Amendment immunity, see *Fitzpatrick* v. *Bitzer*, 427 U. S. 445 (1976), we have required an unequivocal expression of congressional intent to "overturn the constitutionally guaranteed immunity of the several States." *Quern* v. *Jordan*, 440 U. S. 332, 342 (1979) (holding that 42 U. S. C. § 1983 does not override States' Eleventh Amendment immunity). Our reluctance to infer that a State's immunity from suit in the federal courts has been negated stems from recognition of the vital role of the doctrine of sovereign immunity in our federal system. A State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued.[9] As JUSTICE MARSHALL well has noted, "[b]ecause of the problems of federalism inherent in making one sovereign appear against its will in the courts of the other, a restriction upon the exercise of the federal judicial power has long been considered to be appropriate in a case such as this." *Employees* v. *Missouri Dept. of Public Health and Welfare,* 411 U. S. 279, 294 (1973) (concurring in result).[10] Accordingly, in deciding this case we must be guided by "[t]he principles of federalism that inform Eleventh Amendment doctrine." *Hutto* v. *Finney,* 437 U. S. 678, 691 (1978).

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[8] The limitation deprives federal courts of any jurisdiction to entertain such claims, and thus may be raised at any point in a proceeding. "The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment . . . even though urged for the first time in this Court." *Ford Motor Co.* v. *Department of Treasury of Indiana*, 323 U. S. 459, 467 (1945).

[9] For this reason, the Court consistently has held that a State's waiver of sovereign immunity in its own courts is not a waiver of the Eleventh Amendment immunity in the federal courts. See, *e. g.*, *Florida Dept. of Health and Rehabilitative Services* v. *Florida Nursing Home Assn.*, 450 U. S. 147, 150 (1981) *(per curiam)*. "[I]t is not consonant with our dual system for the federal courts . . . to read the consent to embrace federal as well as state courts. . . . [A] clear declaration of the state's intention to

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This Court's decisions thus establish that "an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state." *Employees, supra,* at 280. There may be a question, however, whether a particular suit in fact is a suit against a State. It is clear, of course, that in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment. See, *e. g., Florida Dept. of Health and Rehabilitative Services* v. *Florida Nursing Home Assn.,* 450 U. S. 147 (1981) *(per curiam); Alabama* v. *Pugh,* 438 U. S. 781 (1978) *(per curiam).* This jurisdictional bar applies regardless of the nature of the relief sought. See, *e. g., Missouri* v. *Fiske,* 290 U. S. 18, 27 (1933) ("Expressly applying

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submit its fiscal problems to other courts than those of its own creation must be found." *Great Northern Life Insurance Co.* v. *Read,* 322 U. S. 47, 54 (1944).

[10] See *Nevada* v. *Hall,* 440 U. S., at 418–419 (States were "vitally interested" in whether they would be subject to suit in the federal courts, and the debates about state immunity focused on the question of federal judicial power). Cf. *id.,* at 430–431 (BLACKMUN, J., dissenting) (sovereign immunity is "a guarantee that is implied as an essential component of federalism" and is "sufficiently fundamental to our federal structure to have implicit constitutional dimension"); *id.,* at 437 (REHNQUIST, J., dissenting) ("[T]he States that ratified the Eleventh Amendment thought that they were putting an end to the possibility of individual States as unconsenting defendants in foreign jurisdictions").

to suits in equity as well as at law, the Amendment necessarily embraces demands for the enforcement of equitable rights and the prosecution of equitable remedies when these are asserted and prosecuted by an individual against a State").

When the suit is brought only against state officials, a question arises as to whether that suit is a suit against the State itself. Although prior decisions of this Court have not been entirely consistent on this issue, certain principles are well established. The Eleventh Amendment bars a suit against state officials when "the state is the real, substantial party in interest." *Ford Motor Co.* v. *Department of Treasury of Indiana*, 323 U. S. 459, 464 (1945). See, *e. g.*, *In re Ayers*, 123 U. S. 443, 487–492 (1887); *Louisiana* v. *Jumel*, 107 U. S. 711, 720–723, 727–728 (1883). Thus, "[t]he general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." *Hawaii* v. *Gordon*, 373 U. S. 57, 58 (1963) *(per curiam).*[11] And, as when the State itself is named as the

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[11] "The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'" *Dugan* v. *Rank*, 372 U. S. 609, 620 (1963) (citations omitted).

Respondents do not dispute that the relief sought and awarded below operated against the State in each of the foregoing respects. They suggest, however, that the suit here should not be considered to be against the State for the purposes of the Eleventh Amendment because, they say, petitioners were acting ultra vires their authority. Respondents rely largely on *Florida Dept. of State* v. *Treasure Salvors, Inc.*, 458 U. S. 670 (1982), which in turn was founded upon *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682 (1949). These cases provide no support for this argument. These and other modern cases make clear that a state officer may be said to act ultra vires only when he acts "without any authority whatever." *Treasure Salvors*, 458 U. S., at 697 (opinion of STEVENS, J.); accord, *id.*, at 716 (WHITE, J., concurring in judgment in part and dissenting in part) (test is whether there was no "colorable basis for the exercise of authority by state officials"). As the Court in *Larson* explained, an ultra vires claim rests on "the officer's lack of delegated power. A claim of error in the exercise of that power is therefore not sufficient." *Larson*, *supra*, at 690. Petitioners' actions in operating this mental health institudefendant, a suit against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief. See *Cory* v. *White*, 457 U. S. 85, 91 (1982).

The Court has recognized an important exception to this general rule: a suit challenging the constitutionality of a state official's action is not one against the State. This was the holding in *Ex parte Young*, 209 U. S. 123 (1908), in which a federal court enjoined the Attorney General of the State of Minnesota from bringing suit to enforce a state statute that allegedly violated the Fourteenth Amendment. This Court held that the Eleventh Amendment did not prohibit issuance of this injunction. The theory of the case was that an unconstitutional enactment is "void" and therefore does not "impart to [the officer] any immunity from responsibility to the supreme authority of the United States." *Id.*, at 160. Since the State could not authorize the action, the officer was "stripped of his official or representative character and [was] subjected in his person to the consequences of his individual conduct." *Ibid.*

While the rule permitting suits alleging conduct contrary to "the supreme authority of the United States" has survived, the theory of *Young* has not been provided an expansive interpretation. Thus, in *Edelman* v. *Jordan*, 415 U. S. 651 (1974), the Court emphasized that the Eleventh Amendment bars some forms of injunctive relief against state officials for violation of federal law. *Id.*, at 666–667. In particular, *Edelman* held that when a plaintiff sues a state official alleging a violation of federal law, the federal court

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tion plainly were not beyond their delegated authority in this sense. The MH/MR Act gave them broad discretion to provide "adequate" mental health services. Pa. Stat. Ann., Tit. 50, § 4201(1) (Purdon 1969). The essence of respondents' claim is that petitioners have not provided such services adequately.

In his dissent, JUSTICE STEVENS advances a far broader—and unprecedented—version of the ultra vires doctrine, which we discuss *infra*, at 106–117.

may award an injunction that governs the official's future conduct, but not one that awards retroactive monetary relief. Under the theory of *Young*, such a suit would not be one against the State since the federal-law allegation would strip the state officer of his official authority. Nevertheless, retroactive relief was barred by the Eleventh Amendment.

III

With these principles in mind, we now turn to the question whether the claim that petitioners violated *state law* in carrying out their official duties at Pennhurst is one against the State and therefore barred by the Eleventh Amendment. Respondents advance two principal arguments in support of the judgment below.[12] First, they contend that under the doctrine of *Edelman* v. *Jordan*, *supra*, the suit is not against the State because the courts below ordered only prospective injunctive relief. Second, they assert that the state-law claim properly was decided under the doctrine of pendent jurisdiction. Respondents rely on decisions of this Court awarding relief against state officials on the basis of a pendent state-law claim. See, *e. g.*, *Siler* v. *Louisville & Nashville R. Co.*, 213 U. S., at 193.

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[12] We reject respondents' additional contention that Pennsylvania has waived its immunity from suit in federal court. At the time the suit was filed, suits against Pennsylvania were permitted only where expressly authorized by the legislature, see, *e. g.*, *Freach* v. *Commonwealth*, 471 Pa. 558, 370 A. 2d 1163 (1977), and respondents have not referred us to any provision expressly waiving Pennsylvania's Eleventh Amendment immunity. The State now has a statute governing sovereign immunity, including an express preservation of its immunity from suit in federal court: "Federal courts.—Nothing contained in this subchapter shall be construed to waive the immunity of the Commonwealth from suit in Federal courts guaranteed by the Eleventh Amendment to the Constitution of the United States." 42 Pa. Cons. Stat. § 8521(b) (1980).

We also do not agree with respondents that the presence of the United States as a plaintiff in this case removes the Eleventh Amendment from consideration. Although the Eleventh Amendment does not bar the United States from suing a State in federal court, see, *e. g.*, *Monaco* v. *Mississippi*, 292 U. S. 313, 329 (1934), the United States' presence in the case for any purpose does not eliminate the State's immunity for all purposes. For example, the fact that the federal court could award injunctive relief to the United States on federal constitutional claims would not mean that the court could order the State to pay damages to other plaintiffs. In any case, we think it clear that the United States does not have standing to assert the state-law claims of third parties. For these reasons, the applicability of the Eleventh Amendment to respondents' state-law claim is unaffected by the United States' participation in the case.

A

We first address the contention that respondents' state-law claim is not barred by the Eleventh Amendment because it seeks only prospective relief as defined in *Edelman* v. *Jordan*, *supra*. The Court of Appeals held that if the judgment below rested on federal law, it could be entered against petitioner state officials under the doctrine established in *Edelman* and *Young* even though the prospective financial burden was substantial and ongoing.[13] See 673 F. 2d, at 656. The court assumed, and respondents assert, that this reasoning applies as well when the official acts in violation of state law. This argument misconstrues the basis of the doctrine established in *Young* and *Edelman*.

As discussed above, the injunction in *Young* was justified, notwithstanding the obvious impact on the State itself, on the view that sovereign immunity does not apply because an official who acts unconstitutionally is "stripped of his official or representative character," *Young*, 209 U. S., at 160. This rationale, of course, created the "well-recognized irony" that an official's unconstitutional conduct constitutes state action under the Fourteenth Amendment but not the Eleventh Amendment. *Florida Dept. of State* v. *Treasure Salvors, Inc.*, 458 U. S. 670, 685 (1982) (opinion of STEVENS, J.). Nonetheless, the *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to "the supreme authority of the United States." *Young, supra,* at 160. As JUSTICE BRENNAN has observed, "*Ex parte Young* was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution." *Perez* v. *Ledesma*, 401 U. S. 82, 106 (1971) (concurring in part and dissenting in part). Our decisions repeatedly have emphasized that the *Young* doctrine rests on the need to promote the vindication of federal rights. See, *e. g.*, *Quern* v. *Jordan*, 440 U. S., at 337; *Scheuer* v. *Rhodes*, 416 U. S. 232, 237 (1974); *Georgia Railroad & Banking Co.* v. *Redwine*, 342 U. S. 299, 304 (1952).

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[13] We do not decide whether the District Court would have jurisdiction under this reasoning to grant prospective relief on the basis of federal law, but we note that the scope of any such relief would be constrained by principles of comity and federalism. "Where, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.'" *Rizzo* v. *Goode*, 423 U. S. 362, 378 (1976) (quoting *Stefanelli* v. *Minard*, 342 U. S. 117, 120 (1951)).

The Court also has recognized, however, that the need to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States. This is the significance of *Edelman* v. *Jordan, supra.* We recognized that the prospective relief authorized by *Young* "has permitted the Civil War Amendments to the Constitution to serve as a sword, rather than merely a shield, for those whom they were designed to protect." 415 U. S., at 664. But we declined to extend the fiction of *Young* to encompass retroactive relief, for to do so would effectively eliminate the constitutional immunity of the States. Accordingly, we concluded that although the difference between permissible and impermissible relief "will not in many instances be that between day and night," 415 U. S., at 667, an award of retroactive relief necessarily " 'fall[s] afoul of the Eleventh Amendment if that basic constitutional provision is to be conceived of as having any present force.'" *Id.*, at 665 (quoting *Rothstein* v. *Wyman*, 467 F. 2d 226, 237 (CA2 1972) (McGowan, J., sitting by designation), cert. denied, 411 U. S. 921 (1973)). In sum, *Edelman*'s distinction between prospective and retroactive relief fulfills the underlying purpose of *Ex parte Young* while at the same time preserving to an important degree the constitutional immunity of the States.

This need to reconcile competing interests is wholly absent, however, when a plaintiff alleges that a state official has violated *state* law. In such a case the entire basis for the doctrine of *Young* and *Edelman* disappears. A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment. We conclude that *Young* and *Edelman* are inapplicable in a suit against state officials on the basis of state law.

B

The contrary view of JUSTICE STEVENS' dissent rests on fiction, is wrong on the law, and, most important, would emasculate the Eleventh Amendment.[14] Under his view, an allegation that official conduct is contrary to a state statute would suffice to override the State's protection under that Amendment. The theory is that such conduct is contrary to the official's "instructions," and thus ultra vires his authority.

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[14] We are prompted to respond at some length to JUSTICE STEVENS' 41-page dissent in part by his broad charge that "the Court repudiates at least 28 cases," *post*, at 127. The decisions the dissent relies upon simply do not support this sweeping characterization. See nn. 19, 20, and 21, *infra*.

Accordingly, official action based on a reasonable interpretation of any statute might, if the interpretation turned out to be erroneous,[15] provide the basis for injunctive relief against the actors in their official capacities. In this case, where officials of a major state department, clearly acting within the scope of their authority, were found not to have improved conditions in a state institution adequately under state law, the dissent's result would be that the State itself has forfeited its constitutionally provided immunity.

The theory is out of touch with reality. The dissent does not dispute that the general criterion for determining when a suit is in fact against the sovereign is the *effect* of the relief sought. See *supra*, at 101; *post*, at 146, n. 29. According to the dissent, the relief sought and ordered here—which in effect was that a major state institution be closed and smaller state institutions be created and expansively funded—did not operate against the State. This view would make the law a pretense. No other court or judge in the 10-year history of this litigation has advanced this theory. And the dissent's underlying view that the named defendants here were acting beyond and contrary to their authority cannot be reconciled with reality—or with the record. The District Court in this case held that the individual defendants "acted in the utmost good faith . . . *within the sphere of their official responsibilities*," and therefore were entitled to immunity from damages. 446 F. Supp., at 1324 (emphasis added). The named defendants had nothing to gain personally from their conduct; they were not found to have acted willfully or even negligently. See *ibid.* The court expressly noted that the individual defendants "apparently took every means available to them to reduce the incidents of abuse and injury, but were constantly faced with staff shortages." *Ibid.* It also found "that the individual defendants are dedicated professionals in the field of retardation who were given very little with which to accomplish the habilitation of the retarded at Pennhurst." *Ibid.*[16] As a result, all the relief ordered by the courts below was institutional and official in character. To the extent there was a violation of state law in this case, it is a case of the State itself not fulfilling its legislative promises.[17]

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[15] In this case, for example, the court below rested its finding that state law required habilitation in the least restrictive environment on dicta in *In re Schmidt*, 494 Pa. 86, 429 A. 2d 631 (1981). That decision was not issued until seven years after this suit was filed, and four years after trial ended.

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[16] This part of the court's findings and judgment was not appealed. See *Halderman* v. *Pennhurst State School and Hospital*, 612 F. 2d 84, 90, n. 4 (1979). See also 446 F. Supp., at 1303 ("On the whole, the staff at Pennhurst appears to be dedicated and trying hard to cope with the inadequacies of the institution").

The parties defendant in this suit were not all individuals. They included as well the Pennsylvania Department of Public Welfare, a major department of the State itself; and the Pennhurst State School and Hospital, a state institution. The dissent apparently is arguing that the defendants as a group—including both the state institutions, and state and county officials—were acting ultra vires. Since the institutions were only said to have violated the law through the individual defendants, the District Court's findings, never since questioned by any court, plainly exonerate all the defendants from the dissent's claim that they acted beyond the scope of their authority.

A truth of which the dissent's theoretical argument seems unaware is the plight of many if not most of the mental institutions in our country. As the District Court in this case found: "History is replete with misunderstanding and mistreatment of the retarded." *Id.*, at 1299. Accord, Message from President Kennedy Relative to Mental Illness and Mental Retardation, H. R. Doc. No. 58, 88th Cong., 1st Sess., 13 (1963) ("We as a Nation have long neglected the mentally ill and the mentally retarded"). It is common knowledge that "insane asylums," as they were known until the middle of this century, usually were underfunded and understaffed. It is not easy to persuade competent people to work in these institutions, particularly well-trained professionals. Physical facilities, due to consistent underfunding by state legislatures, have been grossly inadequate—especially in light of advanced knowledge and techniques for the treatment of the mentally ill. See generally *id.*, at 2, 4; The President's Committee on Mental Retardation, MR 68: The Edge of Change 11–13 (1968); President's Committee on Mental Retardation, Changing Patterns in Residential Services for the Mentally Retarded 1–57 (R. Kugel & W. Wolfensberger eds. 1969); R. Scheerenberger, A History of Mental Retardation 240–243 (1983). Only recently have States commenced to move to correct widespread deplorable conditions. The responsibility, as the District Court recognized after a protracted trial, has rested on the *State itself.*

The dissent bases its view on numerous cases from the turn of the century and earlier. These cases do not provide the support the dissent claims to find. Many are simply miscited. For example, with perhaps one exception,[18] none of its Eleventh Amendment cases can be said to hold that injunctive relief could be ordered against state officials for failing to carry out their duties under state statutes.[19] And the federal sovereign immunity cases the dissent relies on for analogy, while far from uniform, make clear that suit may not be predicated on violations of state statutes that command purely discretionary duties.[20] Since it cannot be doubted

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[17] The dissent appears to be confused about our argument here. See *post*, at 138–139. It is of course true, as the dissent says, that the finding below that petitioners acted in good faith and therefore were immune from damages does not affect whether an injunction might be issued against them by a court possessed of jurisdiction. The point is that the courts below did not have jurisdiction because the relief ordered so plainly ran against the State. No one questions that the petitioners in operating Pennhurst were acting in their official capacity. Nor can it be questioned that the judgments under review commanded action that could be taken by petitioners only in their official capacity—and, of course, *only* if the State provided the necessary funding. It is evident that the dissent would vest in federal courts authority, acting solely under *state law*, to ignore the sovereignty of the States that the Eleventh Amendment was adopted to protect. Article III confers no jurisdiction on this Court to strip an explicit Amendment of the Constitution of its substantive meaning.

Contrary to the dissent's view, see *post*, at 150, an injunction based on federal law stands on very different footing, particularly in light of the Civil War Amendments. As we have explained, in such cases this Court is vested with the constitutional duty to vindicate "the supreme authority of the United States," *Ex parte Young*, 209 U. S. 123, 160 (1908). There is no corresponding mandate to enforce state law.

[18] See *Rolston* v. *Missouri Fund Commissioners*, 120 U. S. 390 (1887). In *Rolston*, however, the state officials were ordered to comply with "a plain ministerial duty," see *Great Northern Life Insurance Co.* v. *Read*, 322 U. S., at 51, a far cry from this case, see n. 20, *infra*.

[19] The cases are collected in n. 50 of the dissent, *post*, at 165–166. Several of the cases do not rest on an Eleventh Amendment holding at all. For example, federal jurisdiction in fact was held to be *lacking* in *Martin* v. *Lankford*, 245 U. S. 547 (1918), because of lack of diversity. A fair reading of *South Carolina* v. *Wesley*, 155 U. S. 542 (1895), and the cases it cites, makes clear that the ruling there was on the purely procedural point that the party pressing the appeal was not a party to the proceeding. In

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two other cases the allegation was that a state officer or agency had acted *unconstitutionally*, rather than merely contrary to state law. *Atchison, T. & S. F. R. Co.* v. *O'Connor*, 223 U. S. 280 (1912); *Hopkins* v. *Clemson Agricultural College*, 221 U. S. 636 (1911). In *Johnson* v. *Lankford*, 245 U. S. 541 (1918), the relief sought was not injunctive relief but money damages against the individual officer. See n. 21, *infra*. None of these cases can be said to be overruled by our holding today. As noted *infra*, at 118, the *Greene* cases do not discuss the Eleventh Amendment in connection with the state-law claim.

Tindal v. *Wesley*, 167 U. S. 204 (1897), and *Scully* v. *Bird*, 209 U. S. 481 (1908), are more closely analogous cases. In both of these old cases, however, the allegation was that the defendants had committed common-law torts, not, as here, that they had failed to carry out affirmative duties assigned to them by statute. See *Tindal*, *supra*, at 221 (distinguishing suits brought "to enforce the discharge by the defendants of any specific duty enjoined by the State"); Tr. of Record in *Tindal* v. *Wesley*, O. T. 1896, No. 231, p. 3 (complaint alleged that defendants had "wrongfully entered into said premises and ousted the plaintiff . . . to the damage of the plaintiff ten thousand dollars"); *Scully*, *supra*, at 483 (allegation was that defendant had "injuriously affect[ed] the reputation and sale of [plaintiff's] products"). Tort cases such as these were explicitly overruled in *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682 (1949). See *infra*, at 111–114.

[20] See, *e. g.*, *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 620 (1912) ("The complainant did not ask the court to interfere with the official discretion of the Secretary of War, but challenged his authority to do the things of which complaint was made"); *Santa Fe Pacific R. Co.* v. *Fall*, 259 U. S. 197, 198–199 (1922) (same); see also *Kendall* v. *Stokes*, 3 How. 87, 98 (1845) ("[A] public officer is not liable to an action if he falls into error in a case where the act to be done is not merely a ministerial one, but is one in relation to which it is his duty to exercise judgment and discretion; even although an individual may suffer by his mistake"); *Noble* v. *Union River Logging R. Co.*, 147 U. S. 165, 171–172 (1893); *Belknap* v. *Schild*, 161 U. S. 10, 18 (1896) (under Eleventh Amendment, injunctive relief is permitted where officer commits a tort that is "contrary to a plain official duty requiring no exercise of discretion"); *Wells* v. *Roper*, 246 U. S. 335, 338 (1918); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S., at 695 (suit challenging "incorrect decision as to law or fact" is barred "if the offi-

that the statutes at issue here gave petitioners broad discretion in operating Pennhurst, see n. 11, *supra;* see also 446 F. Supp., at 1324, the conduct alleged in this case would not be ultra vires even under the standards of the dissent's cases.[21]

Thus, while there is language in the early cases that advances the authority-stripping theory advocated by the dissent, this theory had never been pressed as far as JUSTICE STEVENS would do in this case. And when the expansive ap-

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cer making the decision was empowered to do so"); *id.*, at 715 (Frankfurter, J., dissenting) (noting that cases involve orders to comply with nondiscretionary duties). The opinions make clear that the question of discretion went to sovereign immunity, and not to the court's mandamus powers generally. See, *e. g.*, *Philadelphia Co.*, *supra*, at 618–620. The rationale appears to be that discretionary duties have a greater impact on the sovereign because they "brin[g] the operation of governmental machinery into play." *Larson*, *supra*, at 715 (Frankfurter, J., dissenting).

[21] In any event, as with the Eleventh Amendment cases, see n. 19, *supra*, the dissent also is wrong to say that the federal sovereign immunity cases it cites *post*, at 166, n. 50, are today overruled. Many of them were actions for damages in tort against the individual officer. *Little* v. *Barreme*, 2 Cranch 170 (1804); *Wise* v. *Withers*, 3 Cranch 331 (1806); *Mitchell* v. *Harmony*, 13 How. 115 (1852); *Bates* v. *Clark*, 95 U. S. 204 (1877); *Belknap* v. *Schild*, 161 U. S. 10 (1896). In *Belknap* the Court drew a careful distinction between such actions and suits in which the relief would run more directly against the State. *Id.*, at 18. The Court disallowed injunctive relief against the officers on this basis. *Id.*, at 23–25. Contrary to the view of the dissent, *post*, at 135, n. 10, nothing in our opinion touches these cases. The Court in *Larson* similarly distinguished between cases seeking money damages against the individual officer in tort, and those seeking injunctive relief against the officer in his official capacity. It held that the latter sought relief against the sovereign, while the former might not. 337 U. S., at 687–688, and nn. 7, 8.

There is language in other cases that suggests they were actions alleging torts, not statutory violations. See *Philadelphia Co.* v. *Stimson*, *supra*, at 623; *Sloan Shipyards Corp.* v. *United States Shipping Bd. Emergency Fleet Corp.*, 258 U. S. 549, 568 (1922); *Land* v. *Dollar*, 330 U. S. 731, 736 (1947). The remainder clearly distinguish cases (like the present one) involving statutes that command discretionary duties. See n. 20, *supra*. In any case, the Court in *Larson* explicitly limited the precedential value of all of these cases. See *Malone* v. *Bowdoin*, 369 U. S. 643, 646, and n. 6 (1962).

proach of the dissent was advanced, this Court plainly and explicitly rejected it. In *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682 (1949), the Court was faced with the argument that an allegation that a Government official committed a tort sufficed to distinguish the official from the sovereign. Therefore, the argument went, a suit for an injunction to remedy the injury would not be against the sovereign. The Court rejected the argument, noting that it would make the doctrine of sovereign immunity superfluous. A plaintiff would need only to "claim an invasion of his legal rights" in order to override sovereign immunity. *Id.*, at 693. In the Court's view, the argument "confuse[d] the doctrine of sovereign immunity with the requirement that a plaintiff state a cause of action." *Id.*, at 692–693. The dissent's theory suffers a like confusion.[22] Under the dissent's view, a plaintiff would need only to claim a denial of rights protected or provided by statute in order to override sovereign immunity. Except in rare cases it would make the constitutional doctrine of sovereign immunity a nullity.

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[22] In fact, as the dissent itself states, the argument in *Larson* that an allegation of tortious activity overrides sovereign immunity is essentially the same as the dissent's argument that an allegation of conduct contrary to statute overrides sovereign immunity. See *post*, at 158. The result in each case—as the Court in *Larson* recognized—turns on whether the defendant state official was empowered to do what he did, *i. e.*, whether, even if he acted erroneously, it was action within the scope of his authority. See *Larson*, 337 U. S., at 685 (controversy on merits concerned whether officer had interpreted Government contract correctly); *id.*, at 695; *id.*, at 716–717 (Frankfurter, J., dissenting) (in cases alleging a tort, the "official seeks to screen himself behind the sovereign"); *id.*, at 721–722. What the dissent fails to note is that the Court in *Larson* explicitly rejected the view that the dissent here also advances, which is "that an officer given the power to make decisions is only given the power to make correct decisions." *Id.*, at 695. The Court in *Larson* made crystal clear that an officer might make errors and still be acting within the scope of his authority. *Ibid.* (There can be no question that the defendants here were "given the power to make decisions" about the operation of Pennhurst. See n. 11, *supra.*) The dissent's view that state officers "have no discretion to commit a tort," *post*, at 132, n. 7, cannot be reconciled with the plain holding of *Larson*.

The crucial element of the dissent's theory was also the plaintiff's central contention in *Larson.* It is that "[a] sovereign, like any other principal, cannot authorize its agent to violate the law," so that when the agent does so he cannot be acting for the sovereign. *Post,* at 153; see also *post,* at 142, 148–149, 158; cf. *Larson, supra,* at 693–694 ("It is argued . . . that the commission of a tort cannot be authorized by the sovereign. . . . It is on this contention that the respondent's position fundamentally rests . . ."). It is a view of agency law that the Court in *Larson* explicitly rejected.[23] *Larson* thus made clear that, at least insofar as injunctive relief is sought, an error of law by state officers acting in their official capacities will not suffice to override the sovereign immunity of the State where the relief effectively is against it. 337 U. S., at 690, 695.[24] Any resulting disadvantage to the plaintiff was "outweigh[ed]" by "the necessity of permitting the Government to carry out its functions unhampered by direct judicial intervention." *Id.*, at 704. If anything, this public need is even greater when questions of federalism are involved. See *supra*, at 99–100.[25]

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[23] "It has been said, in a very special sense, that, as a matter of agency law, a principal may never lawfully authorize the commission of a tort by his agent. But that statement, in its usual context, is only a way of saying that an agent's liability for torts committed by him cannot be avoided by pleading the direction or authorization of his principal. The agent is himself liable whether or not he has been authorized or even directed to commit the tort. This, of course, does not mean that the principal is not liable nor that the tortious action may not be regarded as the action of the principal." 337 U. S., at 694 (footnote omitted).

[24] The *Larson* Court noted that a similar argument "was at one time advanced in connection with corporate agents, in an effort to avoid corporate liability for torts, but was decisively rejected." *Ibid.* See 10 W. Fletcher, Cyclopedia of the Law of Private Corporations § 4877, p. 350 (rev. ed. 1978) (a corporation is liable for torts committed by its agent within the scope of his authority even though the "act was contrary to or in violation of the instructions or orders given by it to the offending agent"); *id.,* § 4959 (same as to crimes).

The dissent's strained interpretation of *Larson, post,* at 153–155, simply ignores the language that the dissent itself quotes: "It is important to note that in [ultra vires] cases the relief can be granted, without impleading the sovereign, only because of the officer's lack of delegated power. A claim of error in the exercise of that power is therefore not sufficient." 337 U. S., at 689–690.

The dissent in *Larson* made many of the arguments advanced by JUSTICE STEVENS' dissent today, and asserted that many of the same cases were being overruled or ignored.

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[25] As we have discussed *supra*, at 102–103, *Edelman* v. *Jordan*, 415 U. S. 651 (1974), also shows that the broad ultra vires theory enunciated in *Ex parte Young*, 209 U. S. 123 (1908), and in some of the cases quoted by the dissent has been discarded. In *Edelman*, although the state officers were alleged to be acting contrary to law, and therefore should have been "stripped of their authority" under the theory of the dissent, we held the action to be barred by the Eleventh Amendment. The dissent attempts to distinguish *Edelman* on the ground that the retroactive relief there, unlike injunctive relief, does not run only against the agent. *Post*, at 146, n. 29. To say that injunctive relief against state officials acting in their official capacity does not run against the State is to resort to the fictions that characterize the dissent's theories. Unlike the English sovereign perhaps, an American State can act only through its officials. It is true that the Court in *Edelman* recognized that retroactive relief often, or at least sometimes, has a greater impact on the state treasury than does injunctive relief, see 415 U. S., at 666, n. 11, but there was no suggestion that damages alone were thought to run against the State while injunctive relief did not.

We have noted that the authority-stripping theory of *Young* is a fiction that has been narrowly construed. In this light, it may well be wondered what principled basis there is to the ultra vires doctrine as it was set forth in *Larson* and *Florida Dept. of State* v. *Treasure Salvors, Inc.*, 458 U. S. 670 (1982). That doctrine excepts from the Eleventh Amendment bar suits against officers acting in their official capacities but without any statutory authority, even though the relief would operate against the State. At bottom, the doctrine is based on the fiction of the *Young* opinion. The dissent's method is merely to take this fiction to its extreme. While the dissent's result may be logical, in the sense that it is difficult to draw principled lines short of that end, its view would virtually eliminate the constitutional doctrine of sovereign immunity. It is a result from which the Court in *Larson* wisely recoiled. We do so again today. For present purposes, however, we do no more than question the continued vitality of the ultra vires doctrine in the Eleventh Amendment context. We hold only that to the extent the doctrine is consistent with the analysis of this opinion, it is a very narrow exception that will allow suit only under the standards set forth in n. 11, *supra*.

See 337 U. S., at 723–728 (Frankfurter, J., dissenting). Those arguments were rejected, and the cases supporting them are moribund. Since *Larson* was decided in 1949,[26] no opinion by any Member of this Court has cited the cases on which the dissent primarily relies for a proposition as broad as the language the dissent quotes. Many if not most of these cases have not been relied upon in an Eleventh Amendment context at all. Those that have been so cited have been relied upon only for propositions with which no one today quarrels.[27] The plain fact is that the dissent's broad theory, if it ever was accepted to the full extent to which it is now pressed, has not been the law for at least a generation.

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[26] The dissent appears to believe that *Larson* is consistent with all prior law. See *post,* at 153. This view ignores the fact that the *Larson* Court itself understood that it was required to "resolve [a] conflict in doctrine." 337 U. S., at 701. The Court since has recognized that *Larson* represented a watershed in the law of sovereign immunity. In *Malone* v. *Bowdoin,* 369 U. S. 643 (1962), Justice Stewart's opinion for the Court observed that "to reconcile completely all the decisions of the Court in this field prior to 1949 would be a Procrustean task." *Id.*, at 646. His opinion continued:

> "The Court's 1949 *Larson* decision makes it unnecessary, however, to undertake that task here. For in *Larson* the Court, aware that it was called upon to 'resolve the conflict in doctrine' . . . , thoroughly reviewed the many prior decisions, and made an informed and carefully considered choice between the seemingly conflicting precedents." *Ibid.*

The Court included many of the cases upon which the dissent relies in its list of cases that were rejected by *Larson.* See 369 U. S., at 646, n. 6.

[27] *E. g., Rolston* v. *Missouri Fund Commissioners,* 120 U. S. 390 (1887) (never cited); *Scully* v. *Bird,* 209 U. S. 481 (1908) (never cited); *Hopkins* v. *Clemson Agricultural College,* 221 U. S. 636 (1911) (never cited); *Johnson* v. *Lankford,* 245 U. S. 541 (1918) (never cited); *Land* v. *Dollar,* 330 U. S. 731 (1947) (cited only for proposition that judgment that would expend itself on public treasury or interfere with public administration is a suit against the United States); *Cunningham* v. *Macon & Brunswick R. Co.,* 109 U. S. 446 (1883) (cited only for proposition that a suit alleging unconstitutional conduct is not barred by the Eleventh Amendment, and that State cannot be sued without its consent); *Poindexter* v. *Greenhow,* 114 U. S. 270 (1885) (unconstitutional-conduct suit is not suit against State); *Reagan* v. *Farmers' Loan & Trust Co.,* 154 U. S. 362 (1894) (same). Prior to *Florida Dept. of State* v. *Treasure Salvors, Inc., supra, Tindal* v. *Wesley,* 167 U. S. 204 (1897), had been cited only for the proposition that a suit alleging unconstitutional conduct is not barred by the Eleventh Amend-

The reason is obvious. Under the dissent's view of the ultra vires doctrine, the Eleventh Amendment would have force only in the rare case in which a plaintiff foolishly attempts to sue the State in its own name, or where he cannot produce some state statute that has been violated to his asserted injury. Thus, the ultra vires doctrine, a narrow and questionable exception, would swallow the general rule that a suit is against the State if the relief will run against it. That result gives the dissent no pause presumably because of its view that the Eleventh Amendment and sovereign immunity "'undoubtedly ru[n] counter to modern democratic notions of the moral responsibility of the State.'" *Post*, at 164, n. 48 (quoting *Great Northern Life Insurance Co.* v. *Read*, 322 U. S. 47, 59 (1944) (Frankfurter, J., dissenting)). This argument has not been adopted by this Court. See *Great Northern Life Insurance Co.* v. *Read*, *supra*, at 51 ("Efforts to force, through suits against officials, performance of promises by a state collide directly with the necessity that a sovereign must be free from judicial compulsion in the carrying out of its policies within the limits of the Constitution"); *Larson*, 337 U. S., at 704 ("The Government, as representative of the community as a whole, cannot be stopped in its tracks . . ."). Moreover, the argument substantially misses the point with respect to Eleventh Amendment sovereign immunity. As JUSTICE MARSHALL has observed, the Eleventh Amendment's restriction on the federal judicial power is based in large part on "the problems of federalism inherent in making

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ment. The plurality opinion in *Treasure Salvors* discussed *Tindal* at some length, 458 U. S., at 685–688, but noted that the rule of *Tindal* "was clarified in *Larson*." 458 U. S., at 688; see also *id.*, at 715, n. 13 (WHITE, J., concurring in judgment in part and dissenting in part).

As noted, n. 26, *supra*, some of these cases were also cited—and rejected—in *Malone* v. *Bowdoin*, *supra*, at 646, n. 6.

one sovereign appear against its will in the courts of the other." *Employees* v. *Missouri Dept. of Public Health and Welfare*, 411 U. S., at 294 (concurring in result). The dissent totally rejects the Eleventh Amendment's basis in federalism.

C

The reasoning of our recent decisions on sovereign immunity thus leads to the conclusion that a federal suit against state officials on the basis of state law contravenes the Eleventh Amendment when—as here—the relief sought and ordered has an impact directly on the State itself. In reaching a contrary conclusion, the Court of Appeals relied principally on a separate line of cases dealing with pendent jurisdiction. The crucial point for the Court of Appeals was that this Court has granted relief against state officials on the basis of a pendent state-law claim. See 673 F. 2d, at 657–658. We therefore must consider the relationship between pendent jurisdiction and the Eleventh Amendment.

This Court long has held generally that when a federal court obtains jurisdiction over a federal claim, it may adjudicate other related claims over which the court otherwise would not have jurisdiction. See, *e. g.*, *Mine Workers* v. *Gibbs*, 383 U. S. 715, 726 (1966); *Osborn* v. *Bank of United States*, 9 Wheat. 738, 819–823 (1824). The Court also has held that a federal court may resolve a case solely on the basis of a pendent state-law claim, see *Siler*, 213 U. S., at 192–193, and that in fact the court usually should do so in order to avoid federal constitutional questions, see *id.*, at 193; *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter"). But pendent jurisdiction is a judge-made doctrine inferred from the general language of Art. III. The question presented is whether this doctrine may be viewed as displacing the explicit limitation on federal jurisdiction contained in the Eleventh Amendment.

As the Court of Appeals noted, in *Siler* and subsequent cases concerning pendent jurisdiction, relief was granted against state officials on the basis of state-law claims that were pendent to federal constitutional claims. In none of these cases, however, did the Court so much as mention the Eleventh Amendment in connection with the state-law claim. Rather, the Court appears to have assumed that once jurisdiction was established over the federal-law claim, the doctrine of pendent jurisdiction would establish power to hear the state-law claims as well. The Court has not addressed whether that doctrine has a different scope when applied to suits against the State. This is illustrated by *Greene* v. *Louisville & Interurban R. Co.*, 244 U. S. 499 (1917), in which the plaintiff railroads sued state officials, alleging that certain tax assessments were excessive under the Fourteenth Amendment. The Court first rejected the officials' argument that the Eleventh Amendment barred the federal constitutional claim. It held that *Ex parte Young* applied to all allegations challenging the constitutionality of official action, regardless of whether the state statute under which the officials purported to act was constitutional or unconstitutional. See 244 U. S., at 507. Having determined that the Eleventh Amendment did not deprive the federal court of jurisdiction over the Fourteenth Amendment question, the Court declared that the court's jurisdiction extended "to the determination of all questions involved in the case, including questions of state law, irrespective of the disposition that may be made of the federal question, or whether it be found necessary to decide it at all." *Id.*, at 508. The case then was decided solely on state-law grounds. Accord, *Louisville & Nashville R. Co.* v. *Greene*, 244 U. S. 522 (1917).[28]

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[28] The case was argued in the same way. The Eleventh Amendment argument in the briefs is confined to the federal constitutional claims. See, *e. g.*, Brief for Louisville & Nashville R. Co., O. T. 1916, Nos. 778, 779, pp. 15–38 (jurisdiction over federal claims); *id.*, at 38–39 (pendent juris-

These cases thus did not directly confront the question before us. "[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us." *Hagans* v. *Lavine*, 415 U. S. 528, 533, n. 5 (1974).[29] We therefore view the question as an open one.

As noted, the implicit view of these cases seems to have been that once jurisdiction is established on the basis of a federal question, no further Eleventh Amendment inquiry is necessary with respect to other claims raised in the case. This is an erroneous view and contrary to the principles established in our Eleventh Amendment decisions. "The Eleventh Amendment is an explicit limitation of the judicial power of the United States." *Missouri* v. *Fiske*, 290 U. S., at 25. It deprives a federal court of power to decide certain claims against States that otherwise would be within the

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diction over state claims). Indeed the State's brief somewhat curiously closes with a concession that the federal courts had jurisdiction. Brief for State Board and Officers, O. T. 1916, Nos. 778, 779, p. 139; see Reply Brief, O. T. 1916, Nos. 778, 779, p. 2 (pointing out concession). Thus, while the State's position on the Court's jurisdiction over the federal claims is somewhat unclear, the State never argued that there might not be jurisdiction over the local-law claims if the Court found jurisdiction over the federal question in the case.

Nor do any of the other pendent-jurisdiction cases cited in JUSTICE STEVENS' dissent, *post*, at 166, n. 52, discuss the Eleventh Amendment in connection with the state-law claims. Moreover, since *Larson* was decided in 1949, making clear that mere violations of state law would not override the Eleventh Amendment, these cases have been cited only for the proposition that, as a general matter, a federal court should decide a case on state-law grounds where possible to avoid a federal constitutional question. Nothing in our decision is meant to cast doubt on the desirability of applying the *Siler* principle in cases where the federal court has jurisdiction to decide the state-law issues.

[29] See *Edelman* v. *Jordan*, 415 U. S., at 671 ("Having now had an opportunity to more fully consider the Eleventh Amendment issue after briefing and argument, we disapprove the Eleventh Amendment holdings of [certain prior] cases to the extent that they are inconsistent with our holding today").

scope of Art. III's grant of jurisdiction. For example, if a lawsuit against state officials under 42 U. S. C. § 1983 alleges a constitutional claim, the federal court is barred from awarding damages against the state treasury even though the claim arises under the Constitution. See *Quern* v. *Jordan*, 440 U. S. 332 (1979). Similarly, if a § 1983 action alleging a constitutional claim is brought directly against a State, the Eleventh Amendment bars a federal court from granting any relief on that claim. See *Alabama* v. *Pugh*, 438 U. S. 781 (1978) *(per curiam)*. The Amendment thus is a specific constitutional bar against hearing even *federal* claims that otherwise would be within the jurisdiction of the federal courts.[30]

This constitutional bar applies to pendent claims as well. As noted above, pendent jurisdiction is a judge-made doctrine of expediency and efficiency derived from the general Art. III language conferring power to hear all "cases" arising under federal law or between diverse parties. See *Mine Workers* v. *Gibbs*, 383 U. S., at 725. See also *Hagans* v. *Lavine*, *supra*, at 545 (terming pendent jurisdiction "a doctrine of discretion"). The Eleventh Amendment should not be construed to apply with less force to this implied form of jurisdiction than it does to the explicitly granted power to hear federal claims. The history of the adoption and development of the Amendment, see *supra*, at 97–100, confirms that it is an independent limitation on all exercises of Art. III power: "the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given," *Ex parte State of New York*, 256 U. S., at 497. If we were to hold otherwise, a federal court could award damages against a State on the basis of a pendent claim. Our decision in

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[30] See, *e. g.*, *Monaco* v. *Mississippi*, 292 U. S., at 322 ("[A]lthough a case may arise under the Constitution and laws of the United States, the judicial power does not extend to it if the suit is sought to be prosecuted against a State, without her consent, by one of her own citizens"); *Missouri* v. *Fiske*, 290 U. S. 18, 25–26 (1933).

Edelman v. *Jordan* makes clear that pendent jurisdiction does not permit such an evasion of the immunity guaranteed by the Eleventh Amendment. We there held that "the District Court was correct in exercising pendent jurisdiction over [plaintiffs'] statutory claim," 415 U. S., at 653, n. 1, but then concluded that the Eleventh Amendment barred an award of retroactive relief on the basis of that pendent claim. *Id.*, at 678.

In sum, contrary to the view implicit in decisions such as *Greene* v. *Louisville & Interurban R. Co.*, 244 U. S. 499 (1917), neither pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment.[31] A federal court must examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment. We concluded above that a claim that state officials violated state law in carrying out their official responsibilities is a claim against the State that is protected by the Eleventh Amendment. See *supra*, at 106. We now hold that this principle applies as well to state-law claims brought into federal court under pendent jurisdiction.

D

Respondents urge that application of the Eleventh Amendment to pendent state-law claims will have a disruptive effect on litigation against state officials. They argue that the "considerations of judicial economy, convenience, and fairness to litigants" that underlie pendent jurisdiction, see *Gibbs*, *supra*, at 726, counsel against a result that may cause litigants to split causes of action between state and federal courts. They also contend that the policy of avoiding unnecessary constitutional decisions will be contravened if plaintiffs choose to forgo their state-law claims and sue only in federal court or, alternatively, that the policy of *Ex parte Young* will be hindered if plaintiffs choose to forgo their right to a federal forum and bring all of their claims in state court.

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[31] See *Missouri* v. *Fiske, supra*, at 27 ("This is not less a suit against the State because the bill is ancillary and supplemental").

It may be that applying the Eleventh Amendment to pendent claims results in federal claims being brought in state court, or in bifurcation of claims. That is not uncommon in this area. Under *Edelman* v. *Jordan*, *supra*, a suit against state officials for retroactive monetary relief, whether based on federal or state law, must be brought in state court. Challenges to the validity of state tax systems under 42 U. S. C. § 1983 also must be brought in state court. *Fair Assessment in Real Estate Assn., Inc.* v. *McNary*, 454 U. S. 100 (1981). Under the abstention doctrine, unclear issues of state law commonly are split off and referred to the state courts.[32]

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[32] Moreover, allowing claims against state officials based on state law to be brought in the federal courts does not necessarily foster the policies of "judicial economy, convenience and fairness to litigants," *Mine Workers* v. *Gibbs*, 383 U. S. 715, 726 (1966), on which pendent jurisdiction is founded. For example, when a federal decision on state law is obtained, the federal court's construction often is uncertain and ephemeral. In cases of ongoing oversight of a state program that may extend over years, as in this case, the federal intrusion is likely to be extensive. Duplication of effort, inconvenience, and uncertainty may well result. See, *e. g.*, *Burford* v. *Sun Oil Co.*, 319 U. S. 315, 327 (1943) ("Delay, misunderstanding of local law, and needless federal conflict with the state policy, are the inevitable product of this double [*i. e.*, federal-state] system of review"). This case is an example. Here, the federal courts effectively have been undertaking to operate a major state institution based on inferences drawn from dicta in a state-court opinion not decided until four years after the suit was begun. The state court has had no opportunity to review the federal courts' construction of its opinion, or their choice of remedies. The only sure escape from an erroneous interpretation of state law is presumably the rather cumbersome route of legislation.

Waste and delay may also result from abstention, which often is called for when state law is unclear, see *Baggett* v. *Bullitt*, 377 U. S. 360, 378–379 (1964) ("abstention operates to require piecemeal adjudication in many courts, thereby delaying ultimate adjudication on the merits for an undue length of time") (citations omitted), or from dismissals on the basis of comity, which has special force when relief is sought on state-law grounds, see *Gibbs*, *supra*, at 726; *Hawks* v. *Hamill*, 288 U. S. 52, 61 (1933).

In any case, the answer to respondents' assertions is that such considerations of policy cannot override the constitutional limitation on the authority of the federal judiciary to adjudicate suits against a State. See *Missouri* v. *Fiske*, 290 U. S., at 25–26 ("Considerations of convenience open no avenue of escape from the [Amendment's] restriction").[33] That a litigant's choice of forum is reduced "has long been understood to be a part of the tension inherent in our system of federalism." *Employees* v. *Missouri Dept. of Public Health and Welfare*, 411 U. S., at 298 (MARSHALL, J., concurring in result).

IV

Respondents contend that, regardless of the applicability of the Eleventh Amendment to their state claims against petitioner state officials, the judgment may still be upheld against petitioner *county* officials. We are not persuaded. Even assuming that these officials are not immune from suit challenging their actions under the MH/MR Act,[34] it is clear that without the injunction against the state institutions and officials in this case, an order entered on state-law grounds necessarily would be limited. The relief substantially concerns Pennhurst, an arm of the State that is operated by state officials. Moreover, funding for the county mental retardation programs comes almost entirely from the State, see Pa. Stat. Ann., Tit. 50, §§ 4507–4509 (Purdon 1969 and Supp. 1983–1984), and the costs of the Masters have been borne by the State, see 446 F. Supp., at 1327. Finally, the MH/MR Act contemplates that the state and county officials will cooperate in operating mental retardation programs. See *In re Schmidt*, 494 Pa., at 95–96, 429 A. 2d, at 635–636. In short, the present judgment could not be sustained on the basis of the state-law obligations of petitioner county officials. Indeed, any relief granted against the county officials on the basis of the state statute would be partial and incomplete at best. Such an ineffective enforcement of state law would not appear to serve the purposes of efficiency, convenience, and fairness that must inform the exercise of pendent jurisdiction.

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[33] Cf. *Aldinger* v. *Howard*, 427 U. S. 1, 14–15 (1976) (Although "considerations of judicial economy" would be served by permitting pendent-party jurisdiction, "the addition of a completely new party would run counter to the well-established principle that federal courts, as opposed to state trial courts of general jurisdiction, are courts of limited jurisdiction marked out by Congress").

[34] We have held that the Eleventh Amendment does not apply to "counties and similar municipal corporations." *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274, 280 (1977); see *Lincoln County* v. *Luning*, 133 U. S. 529, 530 (1890). At the same time, we have applied the Amendment to bar relief against county officials "in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself." *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U. S. 391, 401 (1979). See, *e. g.*, *Edelman* v. *Jordan*, 415 U. S. 651 (1974) (Eleventh Amendment bars suit against state and county officials for retroactive award of welfare benefits). The Courts of Appeals are in general agreement that a suit against officials of a county or other governmental entity is barred if the relief obtained runs against the State. See, *e. g.*, *Moore* v. *Tangipahoa Parish School Board*, 594 F. 2d 489, 493 (CA5 1979); *Carey* v. *Quern*, 588 F. 2d 230, 233–234 (CA7 1978); *Incarcerated Men of Allen County Jail* v. *Fair*, 507

V

The Court of Appeals upheld the judgment of the District Court solely on the basis of Pennsylvania's MH/MR Act. We hold that these federal courts lacked jurisdiction to enjoin petitioner state institutions and state officials on the basis of

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F. 2d 281, 287–288 (CA6 1974); *Harris* v. *Tooele County School District*, 471 F. 2d 218, 220 (CA10 1973). Given that the actions of the county commissioners and mental-health administrators are dependent on funding from the State, it may be that relief granted against these county officials, when exercising their functions under the MH/MR Act, effectively runs against the State. Cf. *Farr* v. *Chesney*, 441 F. Supp. 127, 130–132 (MD Pa. 1978) (holding that Pennsylvania county commissioners, acting as members of the board of the county office of mental health and retardation, may not be sued for backpay under the Eleventh Amendment). We need not decide this issue in light of our disposition above.

this state law. The District Court also rested its decision on the Eighth and Fourteenth Amendments and § 504 of the Rehabilitation Act of 1973. See *supra*, at 93. On remand the Court of Appeals may consider to what extent, if any, the judgment may be sustained on these bases.[35] The court also may consider whether relief may be granted to respondents under the Developmentally Disabled Assistance and Bill of Rights Act, 42 U. S. C. §§ 6011, 6063 (1976 ed. and Supp. V). The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BRENNAN, dissenting.

I fully agree with JUSTICE STEVENS' dissent. Nevertheless, I write separately to explain that in view of my continued belief that the Eleventh Amendment "bars federal court suits against States only by citizens of other States," *Yeomans* v. *Kentucky*, 423 U. S. 983, 984 (1975) (BRENNAN, J., dissenting), I would hold that petitioners are not entitled to invoke the protections of that Amendment in this federal-court suit by citizens of Pennsylvania. See *Employees* v. *Missouri Dept. of Public Health and Welfare*, 411 U. S. 279, 298 (1973) (BRENNAN, J., dissenting); *Edelman* v. *Jordan*, 415 U. S. 651, 687 (1974) (BRENNAN, J., dissenting). In my view, *Hans* v. *Louisiana*, 134 U. S. 1 (1890), upon which the Court today relies, *ante*, at 98, recognized that the Eleventh Amendment, by its terms, erects a limited constitutional barrier prohibiting suits against States by citizens of another State; the decision, however, "accords to nonconsenting States only a *nonconstitutional* immunity from suit by its own citizens." *Employees* v. *Missouri Dept. of Public*

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[35] On the Fourteenth Amendment issue, the court should consider *Youngberg* v. *Romeo*, 457 U. S. 307 (1982), a decision that was not available when the District Court issued its decision.

Health and Welfare, *supra*, at 313 (BRENNAN, J., dissenting) (emphasis added). For scholarly discussions supporting this view, see Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 Colum. L. Rev. 1889, 1893–1894 (1983); Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One, 126 U. Pa. L. Rev. 515, 538–540, and n. 88 (1978). To the extent that such nonconstitutional sovereign immunity may apply to petitioners, I agree with JUSTICE STEVENS that since petitioners' conduct was prohibited by state law, the protections of sovereign immunity do not extend to them.

JUSTICE STEVENS, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, dissenting.

This case has illuminated the character of an institution. The record demonstrates that the Pennhurst State School and Hospital has been operated in violation of state law. In 1977, after three years of litigation, the District Court entered detailed findings of fact that abundantly support that conclusion. In 1981, after four more years of litigation, this Court ordered the United States Court of Appeals for the Third Circuit to decide whether the law of Pennsylvania provides an independent and adequate ground which can support the District Court's remedial order. The Court of Appeals, sitting en banc, unanimously concluded that it did. This Court does not disagree with that conclusion. Rather, it reverses the Court of Appeals because it did precisely what this Court ordered it to do; the only error committed by the Court of Appeals was its faithful obedience to this Court's command.

This remarkable result is the product of an equally remarkable misapplication of the ancient doctrine of sovereign immunity. In a completely unprecedented holding, today the Court concludes that Pennsylvania's sovereign immunity prevents a federal court from enjoining the conduct that Pennsylvania itself has prohibited. No rational view of the sovereign immunity of the States supports this result. To the contrary, the question whether a federal court may award injunctive relief on the basis of state law has been answered affirmatively by this Court many times in the past. Yet the Court repudiates at least 28 cases, spanning well over a century of this Court's jurisprudence, proclaiming instead that federal courts have no power to enforce the will of the States by enjoining conduct because it violates state law. This new pronouncement will require the federal courts to decide federal constitutional questions despite the availability of state-law grounds for decision, a result inimical to sound principles of judicial restraint. Nothing in the Eleventh Amendment, the conception of state sovereignty it embodies, or the history of this institution, requires or justifies such a perverse result.

I

The conduct of petitioners that the Court attributes to the State of Pennsylvania in order to find it protected by the Eleventh Amendment is described in detail in the District Court's findings. As noted in our prior opinion, *Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1 (1981), and by the majority today, *ante*, at 92–93, those findings were undisputed: "Conditions at Pennhurst are not only dangerous, with the residents often physically abused or drugged by staff members, but also inadequate for the 'habilitation' of the retarded. Indeed, the court found that the physical, intellectual, and emotional skills of some residents have deteriorated at Pennhurst." 451 U. S., at 7 (footnote omitted). The court concluded that Pennhurst was actually hazardous to its residents.[1] Organized programs of training or education were inadequate or entirely unavailable, and programs of treatment or training were not developed for residents. When they visited Pennhurst, shocked parents of residents would find their children bruised, drugged, and unattended. These conditions often led to a deterioration in the condition of the residents after being placed in Pennhurst. Terri Lee Halderman, for example, was learning to talk when she entered Pennhurst; after residing there she lost her verbal skills. At every stage of this litigation, petitioners have conceded that Pennhurst fails to provide even minimally adequate habilitation for its residents. See *Halderman* v. *Pennhurst State School and Hospital*, 612 F. 2d 84, 92–94 (CA3 1979) (en banc); 446 F. Supp. 1295, 1304 (ED Pa. 1977).

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[1] Infectious diseases were common and minimally adequate health care was unavailable. Residents of Pennhurst were inadequately supervised, and as a consequence were often injured by other residents or as a result of self-abuse. Assaults on residents by staff members, including sexual assaults, were frequent. Physical restraints were employed in lieu of adequate staffing, often causing injury to residents, and on one occasion leading to a death. Dangerous psychotropic drugs were indiscriminately used for purposes of behavior control and staff convenience. Staff supervision

The District Court held that these conditions violated each resident's rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, § 504 of the Rehabilitation Act of 1973, 87 Stat. 394, 29 U. S. C. § 794, and the Pennsylvania Mental Health and Mental Retardation Act of 1966, Pa. Stat. Ann., Tit. 50, §§ 4101–4704 (Purdon 1969 and Supp. 1983–1984) (MH/MR Act). The en banc Court of Appeals for the Third Circuit affirmed most of the District Court's judgment, but it grounded its decision solely on the "bill of rights" provision in the Developmentally Disabled Assistance and Bill of Rights Act, 42 U. S. C. § 6010. The court did not consider the constitutional issues or § 504 of the Rehabilitation Act. While it affirmed the District Court's holding that the MH/MR Act provides a right to adequate habilitation, the court did not decide whether that state right justified all of the relief granted by the District Court.

Petitioners sought review by this Court, asserting that the Court of Appeals had erred in its construction of both federal and state statutes. This Court granted certiorari and re-

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during meals was minimal, and residents often stole food from each other—leaving some without enough to eat. The unsafe conditions led to aggressive behavior on the part of residents which was punished by solitary confinement. There was often urine and excrement on the walls.

versed, 451 U. S. 1 (1981), holding that 42 U. S. C. §6010 created no substantive rights. We did not accept respondents' state-law contention, because there was a possibility that the Court of Appeals' analysis of the state statute had been influenced by its erroneous reading of federal law. Concluding that it was "unclear whether state law provides an independent and adequate ground which can support the court's remedial order," 451 U. S., at 31, we "remand[ed] the state-law issue for reconsideration in light of our decision here." *Ibid.* In a footnote we declined to consider the effect of the Pennsylvania Supreme Court's then recent decision, *In re Schmidt*, 494 Pa. 86, 429 A. 2d 631 (1981), on the state-law issues in the case, expressly stating that on remand the Court of Appeals could "consider the state-law issues in light of the Pennsylvania Supreme Court's recent decision." 451 U. S., at 31, n. 24.

On remand, 673 F. 2d 647 (CA3 1982) (en banc), the Court of Appeals, noting that this Court had remanded for reconsideration of the state-law issue, examined the impact of *Schmidt*.[2] According to the Court of Appeals, which was unanimous on this point, the State Supreme Court had "spoken definitively" on the duties of the State under the MH/MR Act, holding that the State was required to provide care to the mentally retarded in the "least restrictive environment." 673 F. 2d, at 651. Since the MH/MR Act fully justified the relief issued in the Court of Appeals' prior judgment, the court reinstated its prior judgment on the basis of petitioners' violation of state law.[3]

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[2] In the questions raised in their petition for certiorari, petitioners do not ask this Court to reexamine the Court of Appeals' conclusion that respondents are clearly entitled to relief under state law. Nor would it be appropriate for this Court to reexamine the unanimous conclusion of the en banc Court of Appeals on a question of state law. See, *e. g.*, *Bishop* v. *Wood*, 426 U. S. 341, 345–346 (1976).

[3] The court therefore found it unnecessary to decide if respondents were also entitled to relief under the federal statutory and constitutional provisions which had been raised in the District Court.

Thus, the District Court found that petitioners have been operating the Pennhurst facility in a way that is forbidden by state law, by federal statute, and by the Federal Constitution. The en banc Court of Appeals for the Third Circuit unanimously concluded that state law provided a clear and adequate basis for upholding the District Court and that it was not necessary to address the federal questions decided by that court. That action conformed precisely to the directive issued by this Court when the case was here before. Petitioners urge this Court to make an unprecedented about-face, and to hold that the Eleventh Amendment prohibited the Court of Appeals from doing what this Court ordered it to do when we instructed it to decide whether respondents were entitled to relief under state law. Of course, if petitioners are correct, then error was committed not by the Court of Appeals, which after all merely obeyed the instruction of this Court, but rather by this Court in 1981 when we ordered the Court of Appeals to consider the state-law issues in the case.

Petitioners' position is utterly without support. The Eleventh Amendment and the doctrine of sovereign immunity it embodies have never been interpreted to deprive a court of jurisdiction to grant relief against government officials who are engaged in conduct that is forbidden by their sovereign. On the contrary, this Court has repeatedly and consistently exercised the power to enjoin state officials from violating state law.[4]

II

The majority proceeds as if this Court has not had previous occasion to consider the Eleventh Amendment argument made by petitioners, and contends that *Ex parte Young*, 209 U. S. 123 (1908), has no application to a suit seeking injunctive relief on the basis of state law. That is simply not the case. The Court rejected the argument that the Eleventh

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[4] Although the Court struggles mightily to distinguish some of the cases that foreclose its holding today, see *ante*, at 106–116, this vain effort merely brings into stark relief the total absence of any affirmative support for its holding.

Amendment precludes injunctive relief on the basis of state law twice only two Terms ago. In *Florida Dept. of State* v. *Treasure Salvors, Inc.*, 458 U. S. 670 (1982), four Justices concluded that a suit for possession of property in the hands of state officials was not barred by the Eleventh Amendment inasmuch as the State did not have even a colorable claim to the property under state law. See *id.*, at 696–697 (opinion of STEVENS, J., joined by BURGER, C. J., and MARSHALL and BLACKMUN, JJ.). Four additional Justices accepted the proposition that if the state officers' conduct had been in violation of a state statute, the Eleventh Amendment would not bar the action. *Id.*, at 714 (WHITE, J., concurring in judgment in part and dissenting in part, joined by POWELL, REHNQUIST, and O'CONNOR, JJ.).[5] And in just one short paragraph in *Cory* v. *White*, 457 U. S. 85 (1982), the Court thrice restated the settled rule that the Eleventh Amendment does not bar suits against state officers when they are "alleged to be acting against federal or state law."[6] These

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[5] "*Larson* [v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682 (1949),] established that where the officer's actions are limited by statute, actions beyond those limitations are to be considered individual and not sovereign actions." 458 U. S., at 714.

[6] "Neither did *Edelman* [v. *Jordan*, 415 U. S. 651 (1974),] deal with a suit naming a state officer as defendant, but not *alleging a violation of either federal or state law.* Thus, there was no occasion in the opinion to cite or discuss the unanimous opinion in *Worcester* [*County Trust Co.* v. *Riley*, 302 U. S. 292 (1937),] that the Eleventh Amendment bars suits against state officers *unless they are alleged to be acting contrary to federal law or against the authority of state law. Edelman* did not hold that suits against state officers who are *not alleged to be acting against federal or state law* are permissible under the Eleventh Amendment if only prospective relief is sought." 457 U. S., at 91 (emphasis supplied).

See also *Worcester County Trust Co.* v. *Riley*, 302 U. S. 292, 297 (1937) ("[G]enerally suits to restrain action of state officials can, consistently with the constitutional prohibition, be prosecuted only when the action sought to be restrained is without the authority of state law or contravenes the statutes or Constitution of the United States. The Eleventh Amendment, which denies to the citizen the right to resort to a federal court to compel or restrain state action, does not preclude suit are only the two most recent in an extraordinarily long line of cases.

By 1908, it was firmly established that conduct of state officials under color of office that is tortious as a matter of state law is not protected by the Eleventh Amendment. See *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 390–391 (1894); *Poindexter* v. *Greenhow*, 114 U. S. 270, 287 (1885); *Cunningham* v. *Macon & Brunswick R. Co.*, 109 U. S. 446, 452 (1883).[7] Cf. *Belknap* v. *Schild*, 161 U. S. 10, 18 (1896) (same rule adopted for sovereign immunity of the United States); *Stanley* v. *Schwalby*, 147 U. S. 508, 518–519 (1893) (same).[8] In *Hopkins* v. *Clemson Agricultural College*, 221

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against a wrongdoer merely because he asserts that his acts are within an official authority which the state does not confer" (citations omitted)). In *Worcester* the Court held a suit barred by the Eleventh Amendment only after stating: "Hence, it cannot be said that the threatened action of respondents involves any breach of state law or of the laws or Constitution of the United States." *Id.*, at 299.

[7] The Court explained that the state officer sued in tort "is not sued as, or because he is, the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he *asserts* authority as such officer. To make out his defence he must show that his authority was sufficient in law to protect him." *Cunningham*, 109 U. S., at 452, quoted in *Poindexter*, 114 U. S., at 287. Today's majority notes that these cases involve nondiscretionary duties of governmental officers, *ante*, at 109–110, but overlooks the reason for this characterization—officers have no discretion to commit a tort. The same is true of the Court's treatment of the federal sovereign immunity cases I discuss below.

[8] See also *Butz* v. *Economou*, 438 U. S. 478, 489–490 (1978) (officers of the United States are liable for their torts unless the torts are authorized by federal law); *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 619–620 (1912) (officers of the United States may be enjoined where they wrongfully interfere with property rights). Justice Holmes had occasion to state that sovereign immunity does not generally extend to the acts of an officer of the sovereign. "In general the United States cannot be sued for a tort, but its immunity does not extend to those that acted in its name." *Sloan Shipyards Corp.* v. *United States Shipping Bd. Emergency Fleet Corp.*, 258 U. S. 549, 568 (1922). He characterized petitioner's argument in that case—that sovereign immunity should extend to the unlawful acts of agents of the United States acting within the scope of their authority—as "a very dangerous departure from one of the first principles of our system

U. S. 636 (1911), the Court explained the relationship of these cases to the doctrine of sovereign immunity.

> "[I]mmunity from suit is a high attribute of sovereignty—a prerogative of the State itself—which cannot be availed of by public agents when sued for their own torts. The Eleventh Amendment was not intended to afford them freedom from liability in any case where, under color of their office, they have injured one of the State's citizens. To grant them such immunity would be to create a privileged class free from liability for wrongs inflicted or injuries threatened. . . .
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> ". . . Besides, neither a State nor an individual can confer upon an agent authority to commit a tort so as to excuse the perpetrator. In such cases the law of agency has no application—the wrongdoer is treated as a principal and individually liable for the damages inflicted and subject to injunction against the commission of acts causing irreparable injury." *Id.*, at 642–643.[9]

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of law. The sovereign properly so called is superior to suit for reasons that often have been explained. But the general rule is that any person within the jurisdiction always is amenable to the law. . . . An instrumentality of government he might be and for the greatest ends, but the agent, because he is agent, does not cease to be answerable for his acts." *Id.*, at 566–567. See also *Brady* v. *Roosevelt S.S. Co.*, 317 U. S. 575 (1943) (following *Sloan*).

[9] The Court also stated:

"Corporate agents or individual officers of the State stand in no better position than officers of the General Government, and as to them it has often been held that: 'The exemption of the United States from judicial process does not protect their officers and agents, civil or military, in time of peace, from being personally liable to an action of tort by a private person, whose rights of property they have wrongfully invaded or injured, *even by authority of the United States.*' *Belknap* v. *Schild*, 161 U. S. 10, 18." 221 U. S., at 645 (emphasis supplied).

The language I have quoted in the text makes it clear that the Court is incorrect to suggest *ante*, at 109–110, n. 19, that *Clemson* dealt only with unconstitutional conduct and not with conduct in violation of state tort law. See also *Old Colony Trust Co.* v. *Seattle*, 271 U. S. 426, 431 (1926) (re-

The principles that were decisive in these cases are not confined to actions under state tort law. They also apply to claims that state officers have violated state statutes. In *Johnson* v. *Lankford*, 245 U. S. 541 (1918), the Court reversed the dismissal of an action against the bank commissioner of Oklahoma and his surety to recover damages for the loss of plaintiff's bank deposit, allegedly caused by the commissioner's failure to safeguard the business and assets of the bank in negligent or willful disregard of his duties under applicable state statutes. The Court explained that the action was not one against the State.

> "To answer it otherwise would be to assert, we think, that whatever an officer does, even in contravention of the laws of the State, is state action, identifies him with it and makes the redress sought against him a claim against the State and therefore prohibited by the Eleventh Amendment. Surely an officer of a State may be delinquent without involving the State in delinquency, indeed, may injure the State by delinquency as well as some resident of the State, and be amenable to both." *Id.*, at 545.

Similarly, in *Rolston* v. *Missouri Fund Commissioners*, 120 U. S. 390 (1887), the Court rejected the argument that a suit to enjoin a state officer to comply with state law violated the Eleventh Amendment. The Court wrote: "Here the suit is to get a state officer to do what a statute requires of him. The litigation is with the officer, not the state." *Id.*, at 411.[10]

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affirming the rationale of *Clemson* in an action against city and county officials).

[10] In *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362 (1894), the Court held that the Eleventh Amendment does not bar a suit alleging that a state officer has wrongfully administered a state statute. The Court awarded injunctive relief against state officers on the basis of both state and federal law. In *Atchison, T. & S. F. R. Co.* v. *O'Connor*, 223 U. S. 280 (1912), the Court held that a suit against state officers seeking recovery of taxes paid under duress was not against the State since a state statute required the recovery of wrongfully paid taxes. See *id.*, at 287. In

Significantly, this rule was expressly reaffirmed in a case decided by this Court in the same Term as *Ex parte Young* and published in the same volume of the United States Re-

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Lankford v. *Platte Iron Works Co.*, 235 U. S. 461 (1915), the Court assumed that the Eleventh Amendment would not bar a suit "to compel submission by the officers of the State to the laws of the State, accomplishing at once the policy of the law and its specific purpose," *id.*, at 471, but rejected the appellees' construction of the state statute. See also *Farish* v. *State Banking Board of Okla.*, 235 U. S. 498 (1915); *American Water Softener Co.* v. *Lankford*, 235 U. S. 496 (1915). In *Martin* v. *Lankford*, 245 U. S. 547 (1918), the Court stated that the case was not barred by the Eleventh Amendment since the claim "is based, as we have seen, upon the tortious conduct of Lankford, not in exertion of the state law but in violation of it. The reasoning of [*Johnson* v. *Lankford*, 245 U. S. 541 (1918),] is therefore applicable and the conclusion must be the same, that is, the action is not one against the State, and the District Court erred in dismissing it for want of jurisdiction on that ground." *Id.*, at 551. While it is true, as the Court points out *ante*, at 109, n. 19, that the *Martin* Court went on to hold that there was no federal diversity jurisdiction over the case, it cannot be denied that the majority today repudiates the reasoning of *Martin*. As for the Court's treatment of *Johnson* v. *Lankford* and *O'Connor*, *ante*, at 109–110, n. 19, it is true that Johnson sought only damages, but the holding of that case, that the action was not barred by the Constitution since it alleged conduct in violation of state law, is utterly at odds with the Court's decision today. Surely the Court cannot mean to rely on a distinction between damages and injunctive relief, for it states: "A federal court's grant of relief against state officers on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. . . . We conclude that *Young* and *Edelman* are inapplicable in a suit against state officials on the basis of state law." *Ante*, at 106. Awarding damages for a violation of state law by state officers acting within their authority is inconsistent with the majority's position that only a need to vindicate federal law justifies the lifting of the Eleventh Amendment bar. If an order to pay damages for wrongful conduct against a state officer is not against the State for purposes of the Eleventh Amendment, an additional order in the form of an injunction telling the officer not to do it again is no more against the State. It cannot be doubted that today's decision overrules *Johnson*. Finally, as for *O'Connor*, while it involved an allegation of unconstitutional action, that allegation was insufficient to lift the bar of the Eleventh Amendment because the complaint sought retroactive relief. It was the fact that relief was authorized by state law that defeated the Eleventh Amendment claim in *O'Connor*. See 223 U. S., at 287.

ports. The appellants in *Scully* v. *Bird*, 209 U. S. 481 (1908), brought a diversity suit seeking injunctive relief against the dairy and food commissioner of the State of Michigan, on the ground that "under cover of his office" he had maliciously engaged in a course of conduct designed to ruin plaintiffs' business in the State. The Circuit Court dismissed the complaint on Eleventh Amendment grounds. On appeal, the plaintiffs contended that the Eleventh Amendment "does not apply where a suit is brought against defendants who, claiming to act as officers of the State, and under color of a statute which is valid and constitutional, but wrongfully administered by them, commit, or threaten to commit, acts of wrong or injury to the rights and property of the plaintiff, or make such administration of the statute an illegal burden and exaction upon the plaintiff." *Ibid.* This Court agreed. It noted that the complaint alleged action "in dereliction of duties enjoined by the statutes of the State," and concluded that it was "manifest from this summary of the allegations of the bill that this is not a suit against the State." *Id.*, at 490.[11]

Finally, in *Greene* v. *Louisville & Interurban R. Co.*, 244 U. S. 499 (1917), and its companion cases, *Louisville & Nashville R. Co.* v. *Greene*, 244 U. S. 522 (1917); *Illinois Central R. Co.* v. *Greene*, 244 U. S. 555 (1917), the plaintiffs challenged the conduct of state officials under both federal and state law. The Court, citing, *inter alia*, *Young* and *Clemson*, held that the Eleventh Amendment did not bar injunctive relief on the basis of state law, noting that the plaintiffs' federal claim was sufficiently substantial to justify the exercise of pendent jurisdiction over plaintiffs' state-law claims,[12] and that since violations of federal and state law had been alleged, it was appropriate for the federal court to issue injunctive relief on the basis of state law without reaching the federal claims, despite the strictures of the Eleventh Amendment. In short, the *Greene* Court approved of precisely the methodology employed by the Court of Appeals in this case.[13]

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[11] Cases construing the sovereign immunity of the Federal Government also hold that conduct by federal officers forbidden by statute is not shielded by sovereign immunity even though the officer is not acting completely beyond his authority. See *Land* v. *Dollar*, 330 U. S. 731 (1947); *Ickes* v. *Fox*, 300 U. S. 82 (1937); *Work* v. *Louisiana*, 269 U. S. 250 (1925); *Santa Fe Pacific R. Co.* v. *Fall*, 259 U. S. 197 (1922); *Payne* v. *Central Pacific R. Co.*, 255 U. S. 228 (1921); *Waite* v. *Macy*, 246 U. S. 606 (1918).

None of these cases contain only "implicit" or *sub silentio* holdings; all of them explicitly consider and reject the claim that the Eleventh Amendment prohibits federal courts from issuing injunctive relief based on state law. There is therefore no basis for the majority's assertion that the issue presented by this case is an open one, *ante*, at 119.[14]

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[12] The Court cited *Siler* v. *Louisville & Nashville R. Co.*, 213 U. S. 175 (1909), which will be discussed in Part IV, *infra*, in support of this proposition.

[13] The unanimous rejection of the argument that the Eleventh Amendment bars claims based on state officers' violations of federal statutes in *Ray* v. *Atlantic Richfield Co.*, 435 U. S. 151, 156, n. 6 (1978), is entirely consistent with my analysis of our cases. But under the majority's view, it represented a rather dramatic extension of *Ex parte Young* to encompass federal statutory claims as well as constitutional claims. *Ray* demonstrates that it cannot be maintained that *Young* and the other cases of this Court permit injunctive relief only when the constitutionality of state officers' conduct is at issue. If that were so *Ray* would be wrongly decided—an argument that a state officer has violated a federal statute does not constitute a challenge to the constitutionality of the officer's conduct. *Chapman* v. *Houston Welfare Rights Org.*, 441 U. S. 600, 612–615 (1979); *Swift & Co.* v. *Wickham*, 382 U. S. 111 (1965). In my view, the Eleventh Amendment claim in *Ray* deserved no more than the cursory footnote it received, since the state officials had engaged in conduct forbidden by statute. If the Court were willing to adhere to settled rules of law today, the Eleventh Amendment claim could be rejected just as summarily.

[14] The majority incredibly claims that *Greene* contains only an implicit holding on the Eleventh Amendment question the Court decides today. *Ante*, at 117–119. In plain words, the *Greene* Court held that the Eleventh Amendment did not bar consideration of the pendent state-law claims advanced in that case. The Court then considered and sustained those claims on their merits.

The Court tries to explain away these cases by arguing that the applicable state statutes gave petitioners such "broad discretion" over Pennhurst that their actions were not ultra vires, *ante*, at 110–111. The Court, however, does not dispute the Court of Appeals' conclusion that these state statutes gave petitioners *no discretion whatsoever* to disregard their duties with respect to institutionalization of the retarded as they did. Petitioners acted outside of their lawful discretion every bit as much as did the government officials in the cases I have discussed, which hold that when an official commits an act prohibited by law, he acts beyond his authority and is not protected by sovereign immunity.[15] After all, it is only common sense to conclude that States do not authorize their officers to violate their legal duties.

The Court also relies heavily on the fact that the District Court found petitioners immune from damages liability because they "'acted in the utmost good faith . . . *within the sphere of their official responsibilities*,'" *ante*, at 107 (emphasis in original) (quoting 446 F. Supp., at 1324). This confuses two distinct concepts. An official can act in good faith and therefore be immune from damages liability despite the fact that he has done that which the law prohibits, a point recognized as recently as *Harlow* v. *Fitzgerald*, 457 U. S. 800 (1982). Nevertheless, good-faith immunity from damages liability is irrelevant to the availability of injunctive relief. See *Wood* v. *Strickland*, 420 U. S. 308, 314–315, n. 6 (1975). The state officials acted in nothing less than good faith and within the sphere of their official responsibilities in asserting Florida's claim to the treasure in *Treasure Salvors;* the same can be said for the bank commissioner's actions in safeguarding bank deposits challenged in *Johnson* v. *Lankford*, the fund commissioner's decision to sell property mortgaged to the State challenged in *Rolston*, and the state food and dairy commissioner's decision to prosecute the appellant for violating the state food impurity Act challenged in *Scully*, to give just a few examples. Yet in each of these cases the state officers' conduct was enjoined. *Greene* makes this point perfectly clear. There state officers did nothing more than carry out responsibilities clearly assigned to them by a statute. Their conduct was neverthless enjoined because this Court held that their conduct violated the State Constitution, despite the fact that their reliance on a statute made it perfectly clear that their conduct was not only in good faith but reasonable. See *Michigan* v. *DeFillippo*, 443 U. S. 31 (1979). Until today the rule has been simple: conduct that exceeds the scope of an official's lawful discretion is not conduct the sovereign has authorized and hence is subject to injunction.[16] Whether that conduct also gives rise to damages liability is an entirely separate question.

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[15] Contrary to the Court's treatment of them, the cases discussed above rely on the doctrine embraced in the quotation from *Clemson* I have set out—officials have no discretion to violate the law. The same is true of the federal sovereign immunity cases. See, *e. g.*, *Land* v. *Dollar*, 330 U. S., at 736 ("the assertion by officers of the Government of their authority to act did not foreclose judicial inquiry into the lawfulness of their action [and] a determination of whether their 'authority is rightfully assumed is the exercise of jurisdiction, and must lead to the decision of the merits of the question'"); *Payne* v. *Central Pacific R. Co.*, 255 U. S., at 236 ("But of course [the Secretary of the Interior's statutory authority] does not clothe him with any discretion to enlarge or curtail the rights of the grantee, nor to substitute his judgment for the will of Congress as manifested in the granting act"); *Waite* v. *Macy*, 246 U. S., at 610 ("The Secretary [of the Treasury] and the board must keep within the statute . . . and we see no reason why the restriction should not be enforced by injunction . . ."); *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 620 (1912) ("And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process").

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[16] In a rather desperate attempt to explain these cases, *amici* suggest that the Court simply did not realize that it was deciding questions of state law, since in the era before *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), and *Mine Workers* v. *Gibbs*, 383 U. S. 715 (1966), it was not clear that diversity cases or pendent claims were governed by state rather than federal law. That suggestion is refuted by the cases discussed above in which it was held that relief could issue against state officers who had violated state statutes. Even under the construction of the Rules of Decision Act, 28 U. S. C. § 1652, adopted in *Swift* v. *Tyson*, 16 Pet. 1 (1842), and repudiated in *Erie*, federal courts were bound to apply state statutes. See, *e. g.*,

III

On its face, the Eleventh Amendment applies only to suits against a State brought by citizens of other States and foreign nations.[17] This textual limitation upon the scope of the States' immunity from suit in federal court was set aside in *Hans* v. *Louisiana*, 134 U. S. 1 (1890). *Hans* was a suit against the State of Louisiana, brought by a citizen of Louisiana seeking to recover interest on the State's bonds. The Court stated that some of the arguments favoring sovereign immunity for the States made during the process of the Amendment's ratification had become a part of the judicial scheme created by the Constitution. As a result, the Court concluded that the Constitution prohibited a suit by a citizen against his or her own State. When called upon to elaborate in *Monaco* v. *Mississippi*, 292 U. S. 313 (1934), the Court explained that the Eleventh Amendment did more than simply prohibit suits brought by citizens of one State against another State. Rather, it exemplified the broader and more ancient doctrine of sovereign immunity, which operates to

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Black & White Taxicab & Transfer Co. v. *Brown & Yellow Taxicab & Transfer Co.*, 276 U. S. 518, 529–531 (1928); *Swift*, 16 Pet., at 18–19. Thus, in these cases the Court was indisputably issuing relief under state law. The Court was explicit about the state-law basis for the relief it granted in *Greene*, to use just one example. It stated that federal jurisdiction "extends, to the determination of all questions involved in the case, including questions of state law, irrespective of the disposition that may be made of the federal question, or whether it be found necessary to decide it at all." 244 U. S., at 508. It then granted plaintiffs relief under state law, and concluded by declining to decide any question of federal law. "It is obvious, however, in view of the result reached upon the questions of state law, just discussed, that the disposition of the cases would not be affected by whatever result we might reach upon the federal question . . . . Therefore, we find it unnecessary to express any opinion upon the question raised under the Fourteenth Amendment." *Id.*, at 519.

[17] "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

bar a suit brought by a citizen against his own State without its consent.[18]

The Court has subsequently adhered to this interpretation of the Eleventh Amendment. For example, in *Quern* v. *Jordan*, 440 U. S. 332 (1979), the Court referred to the Eleventh Amendment as incorporating "the traditional sovereign immunity of the States." *Id.*, at 341. Similarly, in *Fitzpatrick* v. *Bitzer*, 427 U. S. 445 (1976), the Court referred to "the Eleventh Amendment, and the principle of state sovereignty which it embodies . . . ." *Id.*, at 456. See also *Nevada* v. *Hall*, 440 U. S. 410, 438–441 (1979) (REHNQUIST, J., dissenting).[19] Thus, under our cases it is the doctrine of sovereign immunity, rather than the text of the Amendment itself, which is critical to the analysis of any Eleventh Amendment problem.[20]

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[18] "Manifestly, we cannot rest with a mere literal application of the words of § 2 or Article III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting states. Behind the words of the constitutional provisions are postulates which limit and control. There is the essential postulate that the controversies, as contemplated, shall be found to be of a justiciable character. There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention.'" 292 U. S., at 322–323 (footnote omitted). See also *Ex parte State of New York*, 256 U. S. 490, 497 (1921); *Hans* v. *Louisiana*, 134 U. S. 1, 15–18 (1890). Most commentators have understood this Court's Eleventh Amendment cases as taking the position that the Constitution incorporates the common-law doctrine of sovereign immunity. See, *e. g.*, Baker, Federalism and the Eleventh Amendment, 48 U. Colo. L. Rev. 139, 153–158 (1977); Field, The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One, 126 U. Pa. L. Rev. 515, 538–546 (1978); Thornton, The Eleventh Amendment: An Endangered Species, 55 Ind. L. J. 293, 305–310 (1980); Tribe, Intergovernmental Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism, 89 Harv. L. Rev. 682, 684–688 (1976); Comment, Private Suits Against States in the Federal Courts, 33 U. Chi. L. Rev. 331, 334–336 (1966).

[19] Petitioners themselves treat the Eleventh Amendment as equivalent to the doctrine of sovereign immunity. See Brief for Petitioners 12, n. 10. The Court appears to agree. *Ante*, at 98.

The doctrine of sovereign immunity developed in England, where it was thought that the King could not be sued. However, common-law courts, in applying the doctrine, traditionally distinguished between the King and his agents, on the theory that the King would never authorize unlawful conduct, and that therefore the unlawful acts of the King's officers ought not to be treated as acts of the sovereign. See 1 W. Blackstone, Commentaries *244. As early as the 15th century, Holdsworth writes, servants of the King were held liable for their unlawful acts. See 3 W. Holdsworth, A History of English Law 388 (1903). During the 17th century, this rule of law was used extensively to curb the King's authority. The King's officers

> "could do wrong, and if they committed wrongs, whether in the course of their employment or not, they could be made legally liable. The command or instruction of the king could not protect them. If the king really had given such commands or instructions, he must have been deceived." 6 *id.*, at 101 (footnote omitted).

In one famous case, it was held that although process would not issue against the sovereign himself, it could issue against his officers. "[F]or the warrant of no man, not even of the King himself, can excuse the doing of an illegal act." *Sands* v. *Child*, 3 Lev. 351, 352, 83 Eng. Rep. 725, 726 (K. B. 1693).[21] By the 18th century, this rule of law was unquestioned. See 10 Holdsworth, *supra*, at 650–652. And in the 19th century this view was taken by the court to be so well settled as not to require the citation of authority, see *Feather* v. *Queen*, 6 B. & S. 257, 295–297, 122 Eng. Rep. 1191, 1205–1206 (Q. B. 1865).[22]

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[20] Of course, if the Court were to apply the text of the Amendment, it would not bar an action against Pennsylvania by one of its own citizens. See n. 17, *supra*.

[21] The rationale for this principle was compelling. Courts did not wish to confront the King's immunity from suit directly; nevertheless they found the threat to liberty posed by permitting the sovereign's abuses to go unremedied to be intolerable. Since in reality the King could act only through his officers, the rule which permitted suits against those officers formally preserved the sovereign's immunity while operating as one of the means by which courts curbed the abuses of the monarch. See 10 Holdsworth, at 262–268.

It was only natural, then, that this Court, in applying the principles of sovereign immunity, recognized the distinction between a suit against a State and one against its officer.[23] For example, while the Court did inquire as to whether a suit was "in essence" against the sovereign, it soon became settled law that the Eleventh Amendment did not bar suits against state officials in their official capacities challenging unconstitutional conduct. See *Smyth* v. *Ames*, 169 U. S. 466, 518–519 (1898); *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 10–12 (1891); *Poindexter* v. *Greenhow*, 114 U. S. 270, 288 (1885).[24] This rule was reconciled with sovereign immunity principles by use of the traditional rule that an action against an agent of the sovereign who had acted unlawfully was not considered to be against the sovereign. When an official acts pursuant to an unconstitutional statute, the Court reasoned, the absence of valid authority leaves the official ultra vires his authority, and thus a private actor stripped of his status as a representative of the sovereign.[25] In *Ex parte Young*, 209 U. S. 123 (1908), the Court was merely restating a settled principle when it wrote:

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[22] Commentators have noted the influence of these English doctrines on the American conception of sovereign immunity. See Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 Harv. L. Rev. 1, 19–29 (1963); Note, Express Waiver of Eleventh Amendment Immunity, 17 Ga. L. Rev. 513, 517–518 (1983); Note, Developments in the Law—Remedies Against the United States and its Officials, 70 Harv. L. Rev. 827, 831–833 (1957). In fact, in *Belknap* v. *Schild*, 161 U. S. 10 (1896), the Court, in holding that officers of the United States were liable for injuries caused by their unlawful conduct even if they did so acting pursuant to official duties, cited the passage from *Feather* v. *Queen*. See 161 U. S., at 18.

[23] Chief Justice Marshall, writing for the Court, recognized this distinction in the very first case to reach the Court concerning the application of the Eleventh Amendment to the conduct of a state official, *Osborn* v. *Bank of United States*, 9 Wheat. 738 (1824).

[24] See also *McNeill* v. *Southern R. Co.*, 202 U. S. 543, 559 (1906); *Gunter* v. *Atlantic Coast Line R. Co.*, 200 U. S. 273, 283–284 (1906); *Prout* v. *Starr*, 188 U. S. 537 (1903); *Scott* v. *Donald*, 165 U. S. 58, 67–70 (1897); *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S., at 388–391; *In re Tyler*, 149 U. S. 164, 190–191 (1893); *In re Ayers*, 123 U. S. 443, 506–507 (1887); *Hagood* v. *Southern*, 117 U. S. 52, 70 (1886); *Allen* v. *Baltimore & Ohio R. Co.*, 114 U. S. 311, 315–316 (1885); *Board of Liquidation* v. *McComb*, 92 U. S. 531, 541 (1876). Cf. *United States* v. *Lee*, 106 U. S. 196, 219–222 (1882) (sovereign immunity of the United States not a defense against suit charging officers of the United States with unconstitutional conduct).

> "The Act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." *Id.*, at 159–160.[26]

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[25] "That, it is true, is a legislative act of the government of Virginia, but it is not a law of the State of Virginia. The State has passed no such law, for it cannot; and what it cannot do, it certainly, in contemplation of law, has not done. The Constitution of the United States, and its own contract, both irrepealable by any act on its part, are the law of Virginia; and that law made it the duty of the defendant to receive the coupons tendered in payment of taxes, and declared every step to enforce the tax, thereafter taken, to be without warrant of law, and therefore a wrong. He stands, then, stripped of his official character; and, confessing a personal violation of the plaintiff's rights for which he must personally answer, he is without defence." *Poindexter* v. *Greenhow*, 114 U. S., at 288.

[26] See generally Orth, The Interpretation of the Eleventh Amendment, 1798–1908: A Case Study of Judicial Power, 1983 U. Ill. L. Rev. 423. The

The majority states that the holding of *Ex parte Young* is limited to cases in which relief is provided on the basis of federal law, and that it rests entirely on the need to protect the supremacy of federal law. That position overlooks the foundation of the rule of *Young* as well *Pennoyer* v. *McConnaughy* and *Young*'s other predecessors.

The *Young* Court distinguished between the State and its Attorney General because the latter, in violating the Constitution, had engaged in conduct the sovereign could not authorize. The pivotal consideration was not that the conduct violated federal law, since nothing in the jurisprudence of the Eleventh Amendment permits a suit against a sovereign merely because federal law is at issue.[27] Indeed, at least since *Hans* v. *Louisiana*, 134 U. S. 1 (1890), the law has been settled that the Eleventh Amendment applies even though the State is accused of violating the Federal Constitution. In *Hans* the Court held that the Eleventh Amendment applies to all cases within the jurisdiction of the federal courts including those brought to require compliance with federal law, and bars any suit where the State is the proper defendant under sovereign immunity principles. A long line of cases has endorsed that proposition, holding that irrespec-

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Court has adhered to this formulation to the present day. See *Florida Dept. of State* v. *Treasure Salvors, Inc.*, 458 U. S. 670, 684–690 (1982) (opinion of STEVENS, J.); *id.*, at 714–715 (WHITE, J., concurring in judgment in part and dissenting in part); *Ray* v. *Atlantic Richfield Co.*, 435 U. S., at 156, n. 6; *Scheuer* v. *Rhodes*, 416 U. S. 232, 237 (1974); *Georgia Railroad & Banking Co.* v. *Redwine*, 342 U. S. 299 (1952); *Sterling* v. *Constantin*, 287 U. S. 378, 393 (1932). Of course, the fragment from *Young* quoted by the Court, *ante*, at 109, n. 17, does not convey the same meaning when considered in the context of the paragraph quoted above.

[27] As the Solicitor General correctly notes in his brief, "this Court has no power to create any exception to a constitutional bar to federal court jurisdiction. *Ex parte Young* rests instead on recognition that the Eleventh Amendment simply does not apply to suits seeking to restrain illegal acts by state officials—whether those acts are illegal because they violate the Constitution, as in *Young*, or federal or state law." Brief for United States 23 (citations omitted).

tive of the need to vindicate federal law a suit is barred by the Eleventh Amendment if the State is the proper defendant.[28] It was clear until today that "the State [is not] divested of its immunity 'on the mere ground that the case is one arising under the Constitution or laws of the United States.'" *Parden* v. *Terminal Railway of Ala. Docks Dept.*, 377 U. S. 184, 186 (1964) (quoting *Hans*, 134 U. S., at 10).

The pivotal consideration in *Young* was that it was not conduct of the sovereign that was at issue.[29] The rule that unlawful acts of an officer should not be attributed to the sovereign has deep roots in the history of sovereign immunity and makes *Young* reconcilable with the principles of sovereign immunity found in the Eleventh Amendment,[30] rather than merely an unprincipled accommodation between federal and state interests that ignores the principles contained in the Eleventh Amendment.

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[28] See *Quern* v. *Jordan*, 440 U. S. 332, 345, n. 17 (1979); *Alabama* v. *Pugh*, 438 U. S. 781 (1978) *(per curiam)*; *Edelman* v. *Jordan*, 415 U. S. 651, 668–669 (1974); *Employees* v. *Missouri Dept. of Public Health and Welfare*, 411 U. S. 279, 280, n. 1 (1973); *Smith* v. *Reeves*, 178 U. S. 436, 444–449 (1900); *Fitts* v. *McGhee*, 172 U. S. 516 (1899); *In re Ayers*, 123 U. S. 443 (1887); *Hagood* v. *Southern*, 117 U. S. 52 (1886); *Louisiana* v. *Jumel*, 107 U. S. 711 (1883). See generally C. Jacobs, The Eleventh Amendment and Sovereign Immunity 88–91, 109–110 (1972).

[29] The distinction between the sovereign and its agents not only explains why the rationale of *Ex parte Young* and its predecessors is consistent with established sovereign immunity doctrine, but it also explains the critical difference between actions for injunctive relief and actions for damages recognized in *Edelman* v. *Jordan*, 415 U. S. 651 (1973). Since the damages remedy sought in that case would have required payment by the State, it could not be said that the action ran only against the agents of the State. Therefore, while the agents' unlawful conduct was considered ultra vires and hence could be enjoined, a remedy which did run against the sovereign and not merely its agent could not fit within the ultra vires doctrine and hence was impermissible. If damages are not sought from the State and the relief will run only against the state official, damages are a permissible remedy under the Eleventh Amendment. See *Scheuer* v. *Rhodes*, 416 U. S., at 237–238.

[30] "While in England personification of sovereignty in the person of the King may have been possible, attempts to adopt this reasoning in the United States resulted in the postulation of the abstract State as sovereign. Since the ideal State could only act by law, whatever the State did must be lawful. On this ground a distinction was drawn between the State

This rule plainly applies to conduct of state officers in violation of state law. *Young* states that the significance of the charge of unconstitutional conduct is that it renders the state official's conduct "simply an illegal act," and hence the officer is not entitled to the sovereign's immunity. Since a state officer's conduct in violation of state law is certainly no less illegal than his violation of federal law, in either case the official, by committing an illegal act, is "stripped of his official or representative character." For example, one of *Young*'s predecessors held that a suit challenging an unconstitutional attempt by the Virginia Legislature to disavow a state contract was not barred by the Eleventh Amendment, reasoning that

> "inasmuch as, by the Constitution of the United States, *which is also the supreme law of Virginia*, that contract, when made, became thereby unchangeable, irrepealable by the State, the subsequent act of January 26, 1882, and all other like acts, which deny the obligation of that contract and forbid its performance, are not the acts of the State of Virginia. The true and real Commonwealth which contracted the obligation is incapable in law of doing anything in derogation of it. Whatever having that effect, if operative, has been attempted or done, is the work of its government acting without authority, in violation of *its* fundamental law, and must be looked upon, in all courts of justice, as if it were not and never had been. . . . The State of Virginia has done none of

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and its government, which consisted of its officers, and since the State could not commit an illegal act, any such act was imputed to government officers. It logically followed that a suit against state officers was not necessarily a suit against the State." Note, The Sovereign Immunity of the States: The Doctrine and Some of its Recent Developments, 40 Minn. L. Rev. 234, 244–245 (1956) (footnotes omitted). Curiously, the majority appears to acknowledge that it has created a sovereign immunity broader than had ever been enjoyed by the King of England. *Ante*, at 114, n. 25.

> these things with which this defence charges her. The defendant in error is not her officer, her agent, or her representative, in the matter complained of, for he has acted not only without *her* authority, but contrary to *her* express commands." *Poindexter* v. *Greenhow,* 114 U. S., at 292–293 (emphasis supplied).[31]

It is clear that the Court in *Poindexter* attached no significance to the fact that Virginia had been accused of violating federal and not its own law.[32] To the contrary, the Court treated the Federal Constitution as part of Virginia's law, and concluded that the challenged action was not that of Virginia precisely because it violated Virginia's law. The majority's position turns the *Young* doctrine on its head—sovereign immunity did not bar actions challenging unconstitutional conduct by state officers since the Federal Constitution was also to be considered part of the State's law—and since the State could not and would not authorize a violation of its own law, the officers' conduct was considered individual and not sovereign. No doubt the Courts that produced *Poindexter* and *Young* would be shocked to discover that conduct authorized by state law but prohibited by federal law is not considered conduct attributable to the State for sovereign immunity purposes, but conduct prohibited by state law is considered conduct attributable to the very State which prohibited that conduct. Indeed, in *Tindal* v. *Wesley*, 167 U. S. 204 (1899), the Court specifically found that it was impossible to distinguish between a suit challenging unconstitutional conduct of state officers and a suit challenging any other type of unlawful behavior:

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[31] See also *Barney* v. *City of New York,* 193 U. S. 430, 439–441 (1904).

[32] This approach began long before *Poindexter.* The earliest cases in which this Court rejected sovereign immunity defenses raised by officers of the sovereign accused of unlawful conduct did not involve charges of unconstitutional conduct, but rather simple trespass actions. In rejecting the defense, the Court simply noted that although the officers were acting pursuant to their duties, they were engaged in unlawful conduct which therefore could not be the conduct of the sovereign. See *Bates* v. *Clark,* 95 U. S. 204, 209 (1877); *Mitchell* v. *Harmony,* 13 How. 115, 137 (1852); *Wise* v. *Withers,* 3 Cranch 331 (1806); *Little* v. *Barreme,* 2 Cranch 170 (1804). In the landmark case of *Osborn* v. *Bank of United States,* 9 Wheat. 738 (1824), the Court took it as beyond argument that if a state officer unlawfully seized property in an attempt to collect taxes he believed to be owed the State, the Eleventh Amendment would not bar a simple trespass action against the officer. The majority strangely takes comfort in the fact that the former cases allowed damages actions against federal officers. *Ante,* at 111, n. 21. The allowance of a damages remedy is no more consistent with the Court's approach than the allowance of an injunction, see n. 10, *supra.*

> "If a suit against officers of a State to enjoin them from enforcing an unconstitutional statute . . . be not one against the State, it is impossible to see how a suit against the individuals to recover the possession of property belonging to the plaintiff and illegally withheld by the defendants can be deemed a suit against the State." *Id.*, at 222.[33]

These cases are based on the simple idea that an illegal act strips the official of his state-law shield, thereby depriving the official of the sovereign's immunity. The majority criticizes this approach as being "out of touch with reality" because it ignores the practical impact of an injunction on the

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[33] To the same effect as *Tindal* is *South Carolina* v. *Wesley*, 155 U. S. 542 (1895). The majority argues that the case notes that South Carolina was not a party to the proceeding and suggests the ruling was "purely procedural," *ante*, at 109, n. 19, but that misses the whole purpose of the "procedural" point made in the opinion—Eleventh Amendment immunity may only be claimed by the State; it does not extend to state officers accused of violating state law. See also *Florida Dept. of State* v. *Treasure Salvors, Inc.*, 458 U. S., at 697 (opinion of STEVENS, J.) ("If conduct of a state officer taken pursuant to an unconstitutional state statute is deemed to be unauthorized and may be challenged in federal court, conduct undertaken without any authority whatever is also not entitled to Eleventh Amendment immunity").

State though directed at its officers. *Ante*, at 106–108. Yet that criticism cannot account for *Young*, since an injunction has the same effect on the State whether it is based on federal or state law. Indeed, the majority recognizes that injunctions approved by *Young* have an "obvious impact on the State itself," *ante*, at 104. In the final analysis the distinction between the State and its officers, realistic or not, is one firmly embedded in the doctrine of sovereign immunity. It is that doctrine and not any theory of federal supremacy which the Framers placed in the Eleventh Amendment and which this Court therefore has a duty to respect.

It follows that the basis for the *Young* rule is present when the officer sued has violated the law of the sovereign; in all such cases the conduct is of a type that would not be permitted by the sovereign and hence is not attributable to the sovereign under traditional sovereign immunity principles. In such a case, the sovereign's interest lies with those who seek to enforce its laws, rather than those who have violated them.

> "[P]ublic officials may become tort-feasors by exceeding the limits of their authority. And where they unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or in equity . . . [t]he dominant interest of the sovereign is then on the side of the victim who may bring his possessory action to reclaim that which is wrongfully withheld." *Land* v. *Dollar*, 330 U. S. 731, 738 (1947).[34]

The majority's position that the Eleventh Amendment does not permit federal courts to enjoin conduct that the sovereign State itself seeks to prohibit thus is inconsistent with both the doctrine of sovereign immunity and the underlying respect for the integrity of state policy which the Eleventh Amendment protects. The issuance of injunctive relief which enforces state laws and policies, if anything, enhances federal courts' respect for the sovereign prerogatives of the States.[35] The majority's approach, which requires federal courts to ignore questions of state law and to rest their decisions on federal bases, will create more rather than less friction between the States and the federal judiciary.

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[34] While *Land* v. *Dollar* is a case dealing with the sovereign immunity of the Federal Government, it is pertinent to the Eleventh Amendment, which after all for present purposes is no more than an embodiment of sovereign immunity principles.

Moreover, the majority's rule has nothing to do with the basic reason the Eleventh Amendment was added to the Constitution. There is general agreement that the Amendment was passed because the States were fearful that federal courts would force them to pay their Revolutionary War debts, leading to their financial ruin.[36] Entertaining a suit for injunctive relief based on state law implicates none of the concerns of the Framers. Since only injunctive relief is sought there is no threat to the state treasury of the type that concerned the Framers, see *Milliken* v. *Bradley*, 433 U. S. 267, 288–290 (1977); *Edelman* v. *Jordan*, 415 U. S. 651, 667–668 (1974); and if the State wishes to avoid the federal injunction, it can easily do so simply by changing its law. The possibility of States left helpless in the face of disruptive federal decrees which led to the passage of the Eleventh

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[35] For example, in cases barring suits against individual officers as suits against the State, the Court has also acknowledged the importance of state-law authority for the challenged conduct of the officer. In such cases the Court has frequently noted that the relief sought would be unauthorized by state law and would therefore adversely affect the State itself. See, *e. g.*, *Hagood* v. *Southern*, 117 U. S., at 68; *Louisiana* v. *Jumel*, 107 U. S., at 721. In contrast, in cases of official actions contrary to state law, a federal court's remedy would not adversely affect any state policy.

[36] See, *e. g.*, *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U. S. 275, 276, n. 1 (1959); *Missouri* v. *Fiske*, 290 U. S. 18, 27 (1933); *Cohens* v. *Virginia*, 6 Wheat. 264, 406–407 (1821).

Amendment simply is not presented by this case. Indeed, the Framers no doubt would have preferred federal courts to base their decisions on state law, which the State is then free to reexamine, rather than forcing courts to decide cases on federal grounds, leaving the litigation beyond state control.

In light of the preceding, it should come as no surprise that there is absolutely no authority for the majority's position that the rule of *Young* is inapplicable to violations of state law. The only cases the majority cites, *ante*, at 105–106, for the proposition that *Young* is limited to the vindication of federal law do not consider the question whether *Young* permits injunctive relief on the basis of state law—in each of the cases the question was neither presented, briefed, argued, nor decided.[37] It is curious, to say the least, that the majority disapproves of reliance on cases in which the issue we face today was decided *sub silentio*, see *ante*, at 119, yet it is willing to rely on cases in which the issue was not decided at all. In fact, not only is there no precedent for the majority's position, but, as I have demonstrated in Part II, *supra*, there is an avalanche of precedent squarely to the contrary.[38]

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[37] The majority cites *Quern* v. *Jordan*, 440 U. S. 332 (1979); *Scheuer* v. *Rhodes*, 416 U. S. 232 (1974); *Edelman* v. *Jordan*, 415 U. S. 651 (1974); *Georgia Railroad & Banking Co.* v. *Redwine*, 342 U. S. 299 (1952). In each of these cases, the only question presented or decided was whether *monetary* relief could be obtained against state officials on the basis of *federal* law, except for *Redwine*, where the Court decided that a suit to enjoin collection of a state tax on the basis of *federal* law was *not* barred by the Eleventh Amendment. In none of these cases was any question concerning the availability of injunctive relief under *state* law considered even in dicta.

[38] In addition to overruling the cases discussed in Part II, *supra*, the majority's view that *Young* exists simply to ensure the supremacy of federal law indicates that a number of our prior cases, which held that the Eleventh Amendment may bar an action for injunctive relief even where the State has violated the Federal Constitution, see, *e. g.*, *Alabama* v. *Pugh*, 438 U. S. 781 (1978) *(per curiam)*, were incorrectly decided. The Court can have no satisfactory explanation for *Pugh*, which held that even as to a federal constitutional claim, a suit may not be brought directly against a State even where it may be brought against its officials. On the majority's

That the doctrine of sovereign immunity does not protect conduct which has been prohibited by the sovereign is clearly demonstrated by the case on which petitioners chiefly rely, *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682 (1949). The *Larson* opinion teaches that the actions of state officials are not attributable to the State—are ultra vires—in two different types of situations: (1) when the official is engaged in conduct that the sovereign has not authorized, and (2) when he has engaged in conduct that the sovereign has forbidden. A sovereign, like any other principal, cannot authorize its agent to violate the law. When an agent does so, his actions are considered ultra vires and he is liable for his own conduct under the law of agency. Both types of ultra vires conduct are clearly identified in *Larson*.

> "There may be, of course, suits for specific relief against officers of the sovereign which are not suits against the sovereign. If the officer purports to act as an individual and not as an official, a suit directed against that action is not a suit against the sovereign. If the War Assets Administrator had completed a sale of his personal home, he presumably could be enjoined from later conveying it to a third person. On a similar theory, *where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions.* The officer is not doing

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view, there is no basis for distinguishing between the State and its officials—as to both there is a need to vindicate the supremacy of federal law through the issuance of injunctive relief, and unless the officials are acting completely outside of their authority, they must be treated as is the State. However, *Pugh* can be explained simply by reference to *Young*'s use of the ultra vires doctrine with respect to unconstitutional conduct by state officers—such conduct is not conduct by the sovereign because it could not be authorized by the sovereign, hence the officers are not entitled to the sovereign's immunity. A suit directly against the State cannot succeed because the ultra vires doctrine is unavailable without a state officer to which it can be applied. *Pugh* makes it clear that *Young* rests not on a need to vindicate federal law, but on the traditional distinction between the sovereign and its agents.

> the business which the sovereign has empowered him to do *or he is doing it in a way which the sovereign has forbidden.* His actions are *ultra vires* his authority and therefore may be made the object of specific relief. It is important to note that in such cases the relief can be granted, without impleading the sovereign, only because of the officer's lack of delegated power. A claim of error in the exercise of that power is therefore not sufficient. And, since the jurisdiction of the court to hear the case may depend, as we have recently recognized, upon the decision which it ultimately reaches on the merits, it is necessary that the plaintiff set out in his complaint the statutory limitation on which he relies." *Id.*, at 689–690 (emphasis supplied).

Larson thus clearly indicates that the immunity determination depends upon the merits of the plaintiff's claim. The same approach is employed by *Young*—the plaintiff can overcome the state official's immunity only by succeeding on the merits of its claim of unconstitutional conduct.

Following the two-track analysis of *Larson*, the cases considering the question whether the state official is entitled to the sovereign's immunity can be grouped into two categories. In cases like *Larson*, *Malone* v. *Bowdoin*, 369 U. S. 643 (1962), and *Florida Dept. of State* v. *Treasure Salvors, Inc.*, 458 U. S. 670 (1982), which usually involve the State functioning in its proprietary capacity, the ultra vires issue can be resolved solely by reference to the law of agency. Since there is no specific limitation on the powers of the officers other than the general limitations on their authority, the only question that need be asked is whether they have acted completely beyond their authority. But when the State has placed specific limitations on the manner in which state officials may perform their duties, as it often does in regulatory or other administrative contexts such as were considered in *Scully* v. *Bird*, 209 U. S. 481 (1908), and *Johnson* v.

Lankford, 245 U. S. 541 (1918), the ultra vires inquiry also involves the question whether the officials acted in a way that state law forbids. No sovereign would authorize its officials to violate its own law, and if the official does so, then *Larson* indicates that his conduct is ultra vires and not protected by sovereign immunity.

Larson confirms that the Court's disposition of this case in 1981—ordering the Court of Appeals to consider respondents' state-law claims—was fully harmonious with established sovereign immunity principles. The jurisdiction of the federal court was established by a federal claim;[39] the Court of Appeals therefore had jurisdiction to resolve the case and to grant injunctive relief on either federal or state grounds. Respondents pleaded a specific statutory limitation on the way in which petitioners were entitled to run Pennhurst. The District Court and the Court of Appeals have both found that petitioners operated Pennhurst in a way that the sovereign has forbidden. Specifically, both courts concluded that petitioners placed residents in Pennhurst without any consideration at all of the limitations on institutional confinement that are found in state law, and that they failed to create community living programs that are mandated by state law. In short, there can be no dispute that petitioners ran Pennhurst in a way that the sovereign had forbidden. Under the second track of the *Larson* analysis, petitioners were acting ultra vires because they were acting in a way that the sovereign, by statute, had forbidden.[40]

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[39] There can be no doubt that respondents' federal claims were sufficiently substantial to justify federal jurisdiction in this case. In another case brought by a resident of Pennhurst, we held that the Due Process Clause of the Fourteenth Amendment requires, at a minimum, that petitioners provide the residents with reasonable care and safety. See *Youngberg* v. *Romeo*, 457 U. S. 307, 324 (1982). The uncontested findings of the District Court in this case establish that Pennhurst neither was safe nor was it providing reasonable care to its residents. Therefore, respondents' federal claims not only were sufficiently substantial to support the exercise of federal jurisdiction in this case, but also would almost certainly have justified the issuance of at least some injunctive relief had a state-law basis for the relief been unavailable.

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[40] In *Larson*, the Administrator of the War Assets Administration was in possession of coal that the plaintiff claimed the Administrator was contractually obligated to deliver to it. Instead of seeking damages for breach of contract in the Court of Claims, the plaintiff sought an injunction in the District Court. The Court held that the Administrator had acted properly in refusing to deliver the coal and instead insisting that the plaintiff seek its remedy in the Court of Claims.

"There was, it is true, an allegation that the Administrator was acting 'illegally,' and that the refusal to deliver was 'unauthorized.' But these allegations were not based and did not purport to be based upon any lack of delegated power. Nor could they be, since the Administrator was empowered by the sovereign to administer a general sales program encompassing the negotiation of contracts, the shipment of goods and the receipt of payment. A normal concomitant of such powers, as a matter of general agency law, is the power to refuse delivery when, in the agent's view, delivery is not called for under a contract and the power to sell goods which the agent believes are still his principal's to sell." 337 U. S., at 691–692 (footnotes omitted).

Thus, the Administrator had acted properly. He was doing what any agent would do—holding on to property he believed was his principal's and insisting that the claimant sue the principal if it wanted the property. He was merely exercising the "normal" duties of a sales agent. Congress envisioned that he do exactly that; the remedy it had provided required the claimant to sue for damages in the Court of Claims rather than obtaining the property directly from the Administrator, and no one had questioned the constitutional sufficiency of that alternative remedy. See McCord, Fault Without Liability: Immunity of Federal Employees, 1966 U. Ill. Law Forum 849, 862–867. "Since the plaintiff had not made an affirmative allegation of any relevant statutory limitation upon the Administrator's powers, and had made no claim that the Administrator's action amounted to an unconstitutional taking, the Court ruled that the suit must fail as an effort to enjoin the United States." *Malone* v. *Bowdoin*, 369 U. S. 643, 647 (1962). *Malone* can be explained similarly. These cases hold that Congress had empowered the governmental official to make necessary decisions about whether to hold on to property the official believes is the Government's, at least pending the aggrieved party's remedy in the Claims Court (formerly Court of Claims) under the Tucker Act, 28 U. S. C. § 1491 *et seq.* (1982 ed.). See Byse, Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Petitioners readily concede, both in their brief and at oral argument, that the Eleventh Amendment does not bar a suit against state officers who have acted ultra vires. The majority makes a similar concession, *ante*, at 101–102, n. 11. Yet both ignore the fact that the cases, and most especially *Larson*, set out a two-step analysis for ultra vires conduct—conduct that is completely beyond the scope of the officer's authority, or conduct that the sovereign has forbidden. In fact, the majority goes so far as to quote the passage from *Larson* indicating that a state official acts ultra vires when he completely lacks power delegated from the State, *ante*, at 101, n. 11. That quotation ignores sentences immediately preceding and following the quoted passage stating in terms that where an official violates a statutory prohibition, he acts ultra vires and is not protected by sovereign immunity. This omission is understandable, since petitioners' conduct in this case clearly falls into the category of conduct the sovereign has specifically forbidden by statute. Petitioners were told by Pennsylvania how to run Pennhurst, and there is no dispute that they disobeyed their instructions. Yet without explanation, the Court repudiates the two-track analysis of *Larson* and holds that sovereign immunity extends to conduct the sovereign has statutorily prohibited.[41] Thus, con-

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Mandamus, 75 Harv. L. Rev. 1479, 1490–1491 (1962); Jaffe, The Right to Judicial Review I, 71 Harv. L. Rev. 401, 436–437 (1958). Thus, where the official acts as the sovereign intends, he is entitled to the sovereign's immunity under the principles discussed above. Where that is not the case, *Larson* permits injunctive relief. In this case, respondents did plead a specific limitation on petitioners' powers, and the holding of the Court of Appeals on the merits of respondents' state-law claims indicates that petitioners were not exercising the "normal" duties that the sovereign had envisioned for them, unlike the Administrator in *Larson*. Instead, petitioners were running Pennhurst "in a way which the sovereign has forbidden." 337 U. S., at 689.

[41] The majority also repudiates JUSTICE WHITE's recent statement in *Treasure Salvors:* "where the officer's actions are limited by statute, actions beyond those limitations are to be considered individual and not sovereign actions." 458 U. S., at 714. Four Members of today's majority subscribed to that statement only two Terms ago.

trary to the Court's assertion, *Larson* is in conflict with the result reached today.[42]

In sum, a century and a half of this Court's Eleventh Amendment jurisprudence has established the following. A suit alleging that the official had acted within his authority but in a manner contrary to state statutes was not barred because the Eleventh Amendment prohibits suits against States; it does not bar suits against state officials for actions not permitted by the State under its own law. The sovereign could not and would not authorize its officers to violate its own law; hence an action against a state officer seeking redress for conduct not permitted by state law is a suit against the officer, not the sovereign. *Ex parte Young* concluded in as explicit a fashion as possible that unconstitutional action by state officials is not action by the State even if it purports to be authorized by state law, *because the Federal Constitution strikes down the state-law shield.* In the tort cases, if the plaintiff proves his case, there is by definition no state-law defense to shield the defendant. Similarly, *when the state officer violates a state statute, the sovereign has by definition erected no shield against liability.* These precedents make clear that there is no foundation for the contention that the majority embraces—that *Ex parte Young* authorizes injunctive relief against state officials only on the basis of federal law. To the contrary, *Young* is as clear as a bell: the Eleventh Amendment does not apply where there is no state-law shield. That simple principle should control this case.

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[42] Indeed, the majority senses as much, by admitting that it cannot reconcile the ultra vires doctrine endorsed by *Larson* with its approach. See *ante*, at 114, n. 25. The majority is also incorrect in suggesting that *Larson* overruled most if not all of the cases contrary to its position. In fact, *Larson* cited most of those cases with approval, including *Hopkins* v. *Clemson Agricultural College*, 221 U. S. 636 (1911), *Tindal* v. *Wesley*, 167 U. S. 204 (1896), *Poindexter* v. *Greenhow*, 114 U. S. 270 (1885), and *Land* v. *Dollar*, 330 U. S. 731 (1947); the *Larson* opinion stated that it was overruling only a single case, *Goltra* v. *Weeks*, 271 U. S. 536 (1926). See 337 U. S., at 698–702. *Larson* simply did not wreak the kind of havoc on this Court's precedents that the majority does today.

IV

The majority's decision in this case is especially unwise in that it overrules a long line of cases in order to reach a result that is at odds with the usual practices of this Court. In one of the most respected opinions ever written by a Member of this Court, Justice Brandeis wrote:

> "The Court [has] developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision. They are:
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> . . . . .
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> ". . . The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. This rule has found most varied application. Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter. *Siler* v. *Louisville & Nashville R. Co.*, 213 U. S. 175, 191." *Ashwander* v. *TVA*, 297 U. S. 288, 346–347 (1936) (concurring opinion).

The *Siler* case, cited with approval by Justice Brandeis in *Ashwander*, employed a remarkably similar approach to that used by the Court of Appeals in this case. A privately owned railroad corporation brought suit against the members of the railroad commission of Kentucky to enjoin the enforcement of a rate schedule promulgated by the commission. The Federal Circuit Court found that the schedule violated the plaintiff's federal constitutional rights and granted relief. This Court affirmed, but it refused to decide the constitutional question because injunctive relief against the state officials was adequately supported by state law. The Court held that the plaintiff's claim that the schedule violated the Federal Constitution was sufficient to justify the assertion of federal jurisdiction over the case, but then declined to reach the federal question, deciding the case on the basis of state law instead:

> "Where a case in this court can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued and is not departed from without important reasons. In this case we think it much better to decide it with regard to the question of a local nature, involving the construction of the state statute and the authority therein given to the commission to make the order in question, rather than to unnecessarily decide the various constitutional questions appearing in the record." *Siler* v. *Louisville & Nashville R. Co.*, 213 U. S. 175, 193 (1909).[43]

The *Siler* principle has been applied on numerous occasions; when a suit against state officials has presented both federal constitutional questions and issues of state law, the Court has upheld injunctive relief on state-law grounds. See, *e. g.*, *Lee* v. *Bickell*, 292 U. S. 415, 425 (1934); *Glenn* v. *Field Packing Co.*, 290 U. S. 177, 178 (1933); *Davis* v. *Wallace*, 257 U. S. 478, 482–485 (1922); *Louisville & Nashville R. Co.* v. *Greene*, 244 U. S., at 527; *Greene* v. *Louisville & Interurban R. Co.*, 244 U. S., at 508, 512–514.[44]

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[43] In *Siler* the Court decided the case on state-law grounds, even though it acknowledged that "[i]n this case we are without the benefit of a construction of the statute by the highest state court of Kentucky, and we must proceed in the absence of state adjudication upon the subject." 213 U. S., at 194.

[44] Justice Peckham's opinion in *Siler* rested on a long line of cases, dating back to Chief Justice Marshall's decision in *Osborn* v. *Bank of United States*, 9 Wheat., at 822, holding that a federal court has jurisdiction over all the issues—state as well as federal—presented by a case that

In *Hagans* v. *Lavine*, 415 U. S. 528 (1974), the Court quoted from the *Siler* opinion and noted that the "Court has characteristically dealt first with possibly dispositive state law claims pendent to federal constitutional claims." 415 U. S., at 546. It added:

> "Numerous decisions of this Court have stated the general proposition endorsed in *Siler*—that a federal court properly vested with jurisdiction may pass on the state or local law question without deciding the federal constitutional issues—and have then proceeded to dis-

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properly falls within its jurisdiction. Nor was *Siler* breaking new ground in avoiding a federal constitutional question by deciding on state-law grounds. In *Santa Clara County* v. *Southern Pacific R. Co.*, 118 U. S. 394 (1886), the Court noted the importance of the federal constitutional questions. Even though these had been treated as dispositive by the lower court, and though they were the "main—almost the only—questions discussed by counsel," *id.*, at 395, the Court stated: "These questions belong to a class which this court should not decide, unless their determination is essential to the disposal of the case in which they arise." *Id.*, at 410. It then determined that the challenged tax assessments were not authorized by state law and affirmed the judgment solely on that ground. In addition, the Court has routinely applied the *Siler* rule in cases upholding injunctive relief on the basis of state law against municipal officials, see, *e. g.*, *Hillsborough* v. *Cromwell*, 326 U. S. 620, 629 (1946); *Cincinnati* v. *Vester*, 281 U. S. 439, 448–449 (1930); *Risty* v. *Chicago, R. I. & P. R. Co.*, 270 U. S. 378 (1926); *Bohler* v. *Callaway*, 267 U. S. 479, 489 (1925); *Lincoln Gas & Electric Light Co.* v. *City of Lincoln*, 250 U. S. 256, 268–269 (1919); and in cases in which the plaintiffs were not held to be entitled to the relief they sought, see *Schmidt* v. *Oakland Unified School Dist.*, 457 U. S. 594 (1982) *(per curiam)*; *Railroad Comm'n of California* v. *Pacific Gas & Electric Co.*, 302 U. S. 388, 391 (1938); *United Fuel Gas Co.* v. *Railroad Comm'n of Ky.*, 278 U. S. 300, 307 (1929); *Waggoner Estate* v. *Wichita County*, 273 U. S. 113, 116 (1927); *Chicago Great Western R. Co.* v. *Kendall*, 266 U. S. 94, 97–98 (1924); *Ohio Tax Cases*, 232 U. S. 576, 586–587 (1914); *Louisville & Nashville R. Co.* v. *Garrett*, 231 U. S. 298, 303–304 (1913). Numerous other cases decided by this Court have cited *Siler* as an accurate statement of the law regarding pendent jurisdiction. See, *e. g.*, *Aldinger* v. *Howard*, 427 U. S. 1, 7 (1976); *Florida Lime and Avocado Growers, Inc.* v. *Jacobsen*, 362 U. S. 73, 81, n. 7 (1960); *Hurn* v. *Oursler*, 289 U. S. 238, 243–245 (1933).

> pose of the case solely on the nonfederal ground. See, *e. g.*, *Hillsborough* v. *Cromwell*, 326 U. S. 620, 629–630 (1946); *Waggoner Estate* v. *Wichita County*, 273 U. S. 113, 116–119 (1927); *Chicago G. W. R. Co.* v. *Kendall*, 266 U. S. 94 (1924); *United Gas Co.* v. *Railroad Comm'n*, 278 U. S. 300, 308 (1929); *Risty* v. *Chicago, R. I. & P. R. Co.*, 270 U. S. 378, 387 (1926). These and other cases illustrate in practice the wisdom of the federal policy of avoiding constitutional adjudication where not absolutely essential to disposition of a case." *Id.*, at 547, n. 12.

In fact, in this very case we applied the *Siler* rule by remanding the case to the Court of Appeals with explicit instructions to consider whether respondents were entitled to relief under state law.

Not only does the *Siler* rule have an impressive historical pedigree, but it is also strongly supported by the interest in avoiding duplicative litigation and the unnecessary decision of federal constitutional questions.

> "The policy's ultimate foundations . . . lie in all that goes to make up the unique place and character, in our scheme, of judicial review of governmental action for constitutionality. They are found in the delicacy of that function, particularly in view of possible consequences for others stemming also from constitutional roots; the comparative finality of those consequences; the consideration due to the judgment of other repositories of constitutional power concerning the scope of their authority; the necessity, if government is to function constitutionally, for each to keep within its power, including the courts; the inherent limitations of the judicial process, arising especially from its largely negative character and limited resources of enforcement; withal in the paramount importance of constitutional adjudication in our

system." *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 571 (1947).[45]

In addition, application of the *Siler* rule enhances the decisionmaking autonomy of the States. *Siler* directs the federal court to turn first to state law, which the State is free to modify or repeal.[46] By leaving the policy determinations underlying injunctive relief in the hands of the State, the Court of Appeals' approach gives appropriate deference to established state policies.

In contrast, the rule the majority creates today serves none of the interests of the State. The majority prevents federal courts from implementing state policies through equitable enforcement of state law. Instead, federal courts are required to resolve cases on federal grounds that no state authority can undo. Leaving violations of state law unredressed and ensuring that the decisions of federal courts may never be reexamined by the States hardly comports with the respect for States as sovereign entities commanded by the Eleventh Amendment.

V

One basic fact underlies this case: far from immunizing petitioners' conduct, the State of Pennsylvania prohibited it. Respondents do not complain about the conduct of the State of Pennsylvania—it is Pennsylvania's commands which they seek to enforce. Respondents seek only to have Pennhurst run the way Pennsylvania envisioned that it be run. Until today, the Court understood that the Eleventh Amendment does not shield the conduct of state officers which has been prohibited by their sovereign.

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[45] Cf. *H. L.* v. *Matheson*, 450 U. S. 398, 407 (1981) (citing Justice Brandeis' opinion in *Ashwander* v. *TVA*, 297 U. S. 288 (1936)); *Hutchinson* v. *Proxmire*, 443 U. S. 111, 122 (1979) (citing the Court's opinion in *Siler*).

[46] In some of the cases following *Siler*, this Court has required that the decree include a provision expressly authorizing its reopening in the event that a state court later decided the question of state law differently. See *Lee* v. *Bickell*, 292 U. S. 415, 426 (1934); *Wald Transfer & Storage Co.* v. *Smith*, 290 U. S. 602 (1933); *Glenn* v. *Field Packing Co.*, 290 U. S. 177, 178–179 (1933).

Throughout its history this Court has derived strength from institutional self-discipline. Adherence to settled doctrine is presumptively the correct course.[47] Departures are, of course, occasionally required by changes in the fabric of our society.[48] When a court, rather than a legislature, initiates such a departure, it has a special obligation to explain and to justify the new course on which it has embarked. Today, however, the Court casts aside well-settled respected doctrine that plainly commands affirmance of the Court of Appeals—the doctrine of the law of the case,[49] the doctrine of *stare decisis* (the Court repudiates at least 28 cases),[50] the

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[47] "I agree with what the Court stated only days ago, that 'the doctrine of *stare decisis*, while perhaps never entirely persuasive on a constitutional question, is a doctrine that demands respect in a society governed by the rule of law.' *Akron* v. *Akron Center for Reproductive Health, Inc.*, 462 U. S. 416, 419–420 (1983). While the doctrine of *stare decisis* does not absolutely bind the Court to its prior opinions, a decent regard for the orderly development of the law and the administration of justice requires that directly controlling cases be either followed or candidly overruled." *Solem* v. *Helm*, 463 U. S. 277, 311–312 (1983) (BURGER, C. J., dissenting) (footnote omitted).

This statement was joined by four Members of today's majority. The fifth was the author of the opinion of the Court in *City of Akron.*

[48] This is an especially odd context in which to repudiate settled law because changes in our social fabric favor limitation rather than expansion of sovereign immunity. The concept that the sovereign can do no wrong and that citizens should be remediless in the face of its abuses is more a relic of medieval thought than anything else.

"Whether this immunity is an absolute survival of the monarchial privilege, or is a manifestation merely of power, or rests on abstract logical grounds, it undoubtedly runs counter to modern democratic notions of the moral responsibility of the State. Accordingly, courts reflect a strong legislative momentum in their tendency to extend the legal responsibility of Government and to confirm Maitland's belief, expressed nearly fifty years ago that, 'it is a wholesome sight to see "the Crown" sued and answering for its torts.'" *Great Northern Life Ins. Co.* v. *Read*, 322 U. S. 47, 59 (1944) (Frankfurter, J., dissenting) (citation omitted).

In the even older decision of *Poindexter* v. *Greenhow*, 114 U. S. 270 (1885), the Court, after observing that "the distinction between the government of a State and the State itself is important, and should be observed," *id.*, at 290, wrote:

"This distinction is essential to the idea of constitutional government. To deny it or blot it out obliterates the line of demarcation that separates constitutional government from absolutism, free self-government based on the sovereignty of the people from that despotism, whether of the one or the many, which enables the agent of the State to declare and decree that he is the State; to say *'L'Etat c'est moi.'* Of what avail are written constitutions whose bills of right for the security of individual liberty have been written, too often, with the blood of martyrs shed upon the battlefield and the scaffold, if their limitations and restraints upon power may be overpassed with impunity by the very agencies created and appointed to guard, defend, and enforce them; and that, too, with the sacred authority of law, not only compelling obedience, but entitled to respect? And how else can these principles of individual liberty and right be maintained, if, when violated, the judicial tribunals are forbidden to visit penalties upon individual offenders, who are the instruments of wrong, whenever they interpose the shield of the State? The doctrine is not to be tolerated. The whole frame and scheme of the political institutions of this country, State and Federal, protest against it. Their continued existence is not compatible with it. It is the doctrine of absolutism, pure, simple, and naked . . . ." *Id.*, at 291.

See also Gibbons, The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation, 83 Colum. L. Rev. 1889 (1983).

[49] The heart of today's holding is that this Court had no power to act as it did in 1981 when it ordered the Court of Appeals to consider and decide the state-law issues in this very case.

[50] In the following cases the Court held injunctive relief may issue against state officers on the basis of state law after *explicitly* rejecting their Eleventh Amendment defense: *Rolston* v. *Missouri Fund Commissioners*, 120 U. S. 390 (1887); *South Carolina* v. *Wesley*, 155 U. S. 542 (1895); *Tindal* v. *Wesley*, 167 U. S. 204 (1897); *Scully* v. *Bird*, 209 U. S. 481 (1908); *Hopkins* v. *Clemson Agricultural College*, 221 U. S. 636 (1911); *Atchison T. & S. F. R. Co.* v. *O'Connor*, 223 U. S. 280 (1912); *Johnson* v. *Lankford*, 245 U. S. 541 (1918); *Martin* v. *Lankford*, 245 U. S. 547 (1918); *Greene* v. *Louisville & Interurban R. Co.*, 244 U. S. 499 (1917); *Louisville*

doctrine of sovereign immunity,[51] the doctrine of pendent jurisdiction,[52] and the doctrine of judicial restraint. No sound reason justifies the further prolongation of this litigation or this Court's voyage into the sea of undisciplined lawmaking.

& Nashville R. Co. v. *Greene*, 244 U. S. 522 (1917); *Illinois Central R. Co.* v. *Greene*, 244 U. S. 555 (1917).

Since petitioners' position applies also to federal sovereign immunity (indeed the principal case on which they rely, *Larson*, is a federal sovereign immunity case), the following additional cases which refused to apply sovereign immunity to suits against federal officers acting within the scope of their authority because the plaintiff had alleged that the officers had engaged in unlawful conduct are rejected: *Little* v. *Barreme*, 2 Cranch 170 (1804); *Wise* v. *Withers*, 3 Cranch 331 (1806); *Mitchell* v. *Harmony*, 13 How. 115 (1852); *Bates* v. *Clark*, 95 U. S. 204 (1877); *Belknap* v. *Schild*, 161 U. S. 10 (1896); *Sloan Shipyards Corp.* v. *United States Shipping Bd. Emergency Fleet Corp.*, 258 U. S. 549 (1922); *Santa Fe Pacific R. Co.* v. *Fall*, 259 U. S. 197 (1922); *Philadelphia Co.* v. *Stimson*, 223 U. S. 605 (1912); *Land* v. *Dollar*, 330 U. S., at 738. *Larson* itself cites most of these cases with approval, and disapproves of none of them. All are overruled today. In fact, today the Court repudiates the two-track analysis of *Larson*, since in *Larson* the Court stated that conduct which has been specifically prohibited by statute is not protected by sovereign immunity even if it is performed within the scope of the official's duties, yet today the Court holds that even if an officer violates a statute, his conduct is protected by sovereign immunity. The Court also overrules the cases cited in n. 52, *infra*. If some of these cases have been rarely cited, see *ante*, at 115–116, n. 27, this is because until today the law was thought to be well settled on this point.

[51] From the 15th-century English common law to *Larson* and beyond, courts have never held that prohibited conduct can be shielded by sovereign immunity. That rule makes good sense—since a principal cannot authorize unlawful conduct, such conduct is of necessity ultra vires. There is no reason to abandon such a well-settled and sensible rule.

[52] The majority also overrules *Siler* v. *Louisville & Nashville R. Co.*, 213 U. S. 175 (1909), and its progeny, including *Louisville & Nashville R. Co.* v. *Garrett*, 231 U. S. 298 (1913); *Davis* v. *Wallace*, 257 U. S. 478 (1922); *Chicago Great Western R. Co.* v. *Kendall*, 266 U. S. 94 (1924); *United Fuel Gas Co.* v. *Railroad Comm'n of Ky.*, 278 U. S. 300 (1929); *Glenn* v. *Field Packing Co.*, 290 U. S. 177 (1933); *Lee* v. *Bickell*, 292 U. S. 415 (1934); *Railroad Comm'n of California* v. *Pacific Gas & Electric Co.*, 302 U. S. 388 (1938).

As I said at the outset, this case has illuminated the character of an institution.

I respectfully dissent.

McKASKLE, ACTING DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS *v.* WIGGINS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 82–1135. Argued November 9, 1983—Decided January 23, 1984

At his state robbery trial, respondent was permitted to proceed *pro se*, but the trial court appointed standby counsel to assist him. Before and during the trial, respondent frequently changed his mind regarding the standby counsel's role, objecting to counsel's participation on some occasions but agreeing to it on other occasions. Following his conviction, respondent unsuccessfully moved for a new trial on the ground that his standby counsel had unfairly interfered with his presentation of his defense. After exhausting direct appellate and state habeas corpus review, respondent filed a habeas petition in Federal District Court, claiming that standby counsel's conduct deprived him of his right to present his own defense, as guaranteed by *Faretta* v. *California*, 422 U. S. 806. The District Court denied the petition, but the Court of Appeals reversed, holding that respondent's Sixth Amendment right of self-representation was violated by the unsolicited participation of overzealous standby counsel.

Held: Respondent's Sixth Amendment right to conduct his own defense was not violated, since it appears that he was allowed to make his own appearances as he saw fit and that his standby counsel's unsolicited involvement was held within reasonable limits. Pp. 173–187.

(a) The Counsel Clause of the Sixth Amendment implies a right in the defendant to conduct his own defense, with assistance at what is his, not counsel's, trial. Here, the record reveals that respondent was accorded the rights of a *pro se* defendant to control the organization and conduct of his own defense, to make motions, to argue points of law, to participate in *voir dire*, to question witnesses, and to address the court and the jury at appropriate points in the trial. Pp. 173–175.

(b) The objectives of affirming a *pro se* defendant's dignity and autonomy and of allowing the presentation of what may be his best possible defense can both be achieved without categorically silencing standby counsel. In determining whether a defendant's *Faretta* rights have been respected, the primary focus must be on whether he had a fair chance to present his case in his own way. Such rights, however, do impose limits on the extent of standby counsel's unsolicited participation.

First, the *pro se* defendant is entitled to preserve actual control over the case he chooses to present to the jury, and, second, standby counsel's participation without the defendant's consent should not be allowed to destroy the jury's perception that the defendant is representing himself. Pp. 176–179.

(c) The appearance of a *pro se* defendant's self-representation will not be undermined by standby counsel's participation outside the jury's presence. In this case, most of the incidents of which respondent complains occurred when the jury was not in the courtroom, and, while some of those incidents were regrettable, counsel's participation fully satisfied the first limitation noted above. Respondent was given ample opportunity to present his own position to the court on every matter discussed, and all conflicts between respondent and counsel were resolved in respondent's favor. Pp. 179–181.

(d) It is when standby counsel participate in the jury's presence that a defendant may legitimately claim that excessive involvement by counsel will destroy the appearance that the defendant is acting *pro se*. Nevertheless, a categorical bar on counsel's participation is unnecessary. Here, where respondent's *pro se* efforts were undermined primarily by his own changes of mind regarding counsel's role, it is very difficult to determine how much of counsel's participation was in fact contrary to respondent's desires. If a defendant is given the opportunity and elects to have counsel appear before the court or a jury, his complaints concerning counsel's subsequent unsolicited participation lose much of their force. Once a *pro se* defendant invites or agrees to any substantial participation by counsel, subsequent appearances by counsel must be presumed to be with the defendant's acquiescence, at least until the defendant expressly and unambiguously renews his request that standby counsel be silenced. Pp. 181–183.

(e) A defendant's Sixth Amendment rights are not violated when a trial judge appoints standby counsel—even over the defendant's objection—to relieve the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of his achievement of his own clearly indicated goals. At respondent's trial a significant part of standby counsel's participation involved such basic procedures, and none interfered with respondent's control over his defense or undermined his appearance before the jury in the status of a *pro se* defendant. Pp. 183–185.

(f) Aside from standby counsel's participation that was either approved by respondent or attendant to routine clerical or procedural matters, counsel's unsolicited comments in front of the jury were not substantial or frequent enough to have seriously undermined respondent's appearance before the jury in the status of representing himself. Pp. 185–187.

681 F. 2d 266, reversed.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and POWELL, REHNQUIST, and STEVENS, JJ., joined. BLACKMUN, J., concurred in the result. WHITE, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 188.

Leslie A. Benitez, Assistant Attorney General of Texas, argued the cause for petitioner. With her on the brief were *Jim Mattox*, Attorney General, *David R. Richards*, Executive Assistant Attorney General, and *Nancy M. Simonson*, Assistant Attorney General.

Craig Smyser, by appointment of the Court, 460 U. S. 1035, argued the cause *pro hac vice* and filed a brief for respondent. Respondent filed a brief *pro se*.

JUSTICE O'CONNOR delivered the opinion of the Court.

In *Faretta* v. *California*, 422 U. S. 806 (1975), this Court recognized a defendant's Sixth Amendment right to conduct his own defense. The Court also held that a trial court may appoint "standby counsel" to assist the *pro se* defendant in his defense. Today we must decide what role standby counsel who is present at trial over the defendant's objection may play consistent with the protection of the defendant's *Faretta* rights.

I

Carl Edwin Wiggins was convicted of robbery and sentenced to life imprisonment as a recidivist. His conviction was set aside because of a defective indictment. When Wiggins was retried he was again convicted and sentenced to life imprisonment. Standby counsel were appointed to assist Wiggins at both trials. Wiggins now challenges counsel's participation in his second trial.

Prior to the first trial, a hearing was held on Wiggins' motion to proceed *pro se*. The court granted the motion, Record 4a, but simultaneously appointed two attorneys to act as standby counsel. Wiggins initially objected to their presence. *Id.*, at 11a. Shortly thereafter, however, counsel asked Wiggins how they should conduct themselves at trial, and Wiggins expressly requested that they bring appropriate objections directly to the attention of the court, without first consulting him. *Id.*, at 37a. After the trial, newly appointed counsel discovered that the original indictment was defective, and a new trial was granted.

On April 16, 1973, about two months before the second trial began, Wiggins filed a request for appointed counsel, stating that he wished to rescind his earlier waiver of counsel. App. A–54—A–55.[1] The next day Wiggins filled out and signed a form captioned "Petition for Appointment of Counsel and Order Thereon."[2] The trial court appointed Benjamin Samples. About a month later Wiggins filed an additional request for counsel.[3] Five days later Wiggins filled out another appointment of counsel form, and the trial court appointed R. Norvell Graham.

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[1] Wiggins' letter to the trial judge stated:

"I wish to *rescind my* earlier *request to waive* court appointed *assistance counsel*—and request *that this honorable* court appoint *counsel* to assist me.

"I would appreciate very much if the court would appoint the Honorable Stewart J. Alexander who was previously appointed to assist on appeal, before sentence was set aside.

"And I apologize if I have caused an inconvenience to the court." Record 584 (original emphasis).

[2] The petition read:

"Now comes Carl Edwin Wiggins, defendant in the above styled and numbered cause, and respectfully petitions the Court to appoint counsel to represent him in said felony cause and would show to the Court that he is too poor to employ counsel." *Id.*, at 586.

[3] This request read in pertinent part:

"I have been indicted four (4) times of the same offense . . . .

"According to Higgins v. State and Snow v. State, where prosecutions were dismissed—and according to VACCP Art. 28.13, I should'nt *[sic]* be tried again.

"*Will you please appoint counsel* to cite authorities on this issue, also, in favor of the state. I find only authorities indicating that further prosecution is barred. None indicating other-wise *[sic]*." *Id.*, at 623 (original emphasis).

Wiggins' wishes respecting appointed counsel remained volatile as his second trial approached. When pretrial proceedings began on June 4, 1973, Wiggins announced that he would be defending himself *pro se;* he then firmly requested that counsel not be allowed to interfere with Wiggins' presentations to the court. Record 8, 12, 39–40. Wiggins reaffirmed his desire to proceed *pro se* on the following morning, June 5, and objected even to the court's insistence that counsel remain available for consultation. *Id.*, at 66–67. The trial began later that day, and shortly thereafter Wiggins interrupted his cross-examination of a witness to consult with Graham off the record. *Id.*, at 201. Still later, Wiggins expressly agreed to allow Graham to conduct *voir dire* of another witness. *Id.*, at 210.

Wiggins started the next day of trial, June 6, with a request that the trial not proceed in Samples' absence from the courtroom. *Id.*, at 255. Later that morning Wiggins requested that counsel not be allowed to assist or interrupt, *id.*, at 308, but a short while after Wiggins interrupted his own cross-examination of a witness to confer with Samples off the record. *Id.*, at 310. When the trial reconvened in the afternoon, Wiggins agreed to proceed in Samples' absence. *Id.*, at 328. After Samples returned, however, Wiggins again interrupted his own cross-examination of a witness to confer with him. *Id.*, at 333. Later Wiggins insisted that counsel should not initiate private consultations with him. *Id.*, at 345–346. Before the end of the day Wiggins once again found occasion to interrupt his own examination of a witness to confer with Samples. *Id.*, at 384.

On the following day, June 7, Wiggins agreed that Graham would make Wiggins' opening statement to the jury. *Id.*, at 486. On June 8, Wiggins was once again willing to have the trial proceed in the absence of one of his standby counsel.

Id., at 546. Following his conviction, Wiggins moved for a new trial. At the July 31 hearing on Wiggins' motion, he denounced the services standby counsel had provided. He insisted that they had unfairly interfered with his presentation of his defense. *Id.*, at 572b.

After exhausting direct appellate and state habeas review Wiggins filed a petition for federal habeas corpus relief. He argued that standby counsel's conduct deprived him of his right to present his own defense, as guaranteed by *Faretta.* The District Court denied the habeas petition, but the Court of Appeals for the Fifth Circuit reversed. *Wiggins* v. *Estelle,* 681 F. 2d 266, rehearing denied, 691 F. 2d 213 (1982). The Court of Appeals held that Wiggins' Sixth Amendment right of self-representation was violated by the unsolicited participation of overzealous standby counsel:

> "[T]he rule that we establish today is that court-appointed standby counsel is 'to be seen, but not heard.' By this we mean that he is not to compete with the defendant or supersede his defense. Rather, his presence is there for advisory purposes only, to be used or not used as the defendant sees fit." 681 F. 2d, at 273 (footnote omitted).

We do not accept the Court of Appeals' rule, and reverse its judgment.

II

A

In *Faretta* the Court considered the case of a criminal defendant who was required to present his defense exclusively through counsel. The Court held that an accused has a Sixth Amendment right to conduct his own defense, provided only that he knowingly and intelligently forgoes his right to counsel and that he is able and willing to abide by rules of procedure and courtroom protocol. *Faretta* concluded that "[u]nless the accused has acquiesced in [representation through counsel], the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense." 422 U. S., at 821.

Faretta's holding was based on the longstanding recognition of a right of self-representation in federal and most state courts, and on the language, structure, and spirit of the Sixth Amendment. Under that Amendment, it is the accused, not counsel, who must be "informed of the nature and cause of the accusation," who has the right to confront witnesses, and who must be accorded "compulsory process for obtaining witnesses in his favor." The Counsel Clause itself, which permits the accused "to have the Assistance of Counsel for his defence," implies a right in the defendant to conduct his own defense, with *assistance* at what, after all, is his, not counsel's trial.

B

A defendant's right to self-representation plainly encompasses certain specific rights to have his voice heard. The *pro se* defendant must be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in *voir dire*, to question witnesses, and to address the court and the jury at appropriate points in the trial. The record reveals that Wiggins was in fact accorded all of these rights.

Before trial Wiggins moved the trial court to order preparation of a transcript of the first trial. He, not standby counsel, then waived receipt of the transcript and announced ready for trial. Record 7–11, 65–66. He filed and argued at least 12 *pro se* motions in pretrial proceedings.[4] Wiggins alone conducted the defense's *voir dire* of prospective jurors[5] and made the opening statement for the defense to the jury. *Id.*, at 347–348.

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[4] These included a motion for discovery, *id.*, at 14, a motion to set aside the indictment, *id.*, at 16, a double jeopardy claim, *id.*, at 17–22, a motion *in limine*, a motion for special relief, *id.*, at 23–24, a motion to correct an offense report, *id.*, at 31, a motion for discovery of any exculpatory material in the prosecutor's file, *id.*, at 33, a motion to keep a marked document out of the sight of the jury, *id.*, at 42, a motion to sequester the jury, *id.*, at 44–45, another motion *in limine*, *id.*, at 57–58, a motion for a change of

Wiggins filed numerous *pro se* motions in the course of the trial.[6] He cross-examined the prosecution's witnesses freely, *id.*, at 26–30, 199–206, 224–226, 228–237, 269–286, 290–292, 296–301, 310, 319–326, 332–336, 434–447, 455–468, 532–534, and registered his own objections, *id.*, at 237, 238, 317, 318, 352, 353–359, 418–420, 450, 484, 485, 497, 502–503, 536. Throughout the trial Wiggins selected the witnesses for the defense, *id.*, at 47, 56, 60–61, 348, 368, 381, 383, 384, 393, 396, 398–399, 403, 408, 412, 413, 424, examined them, *id.*, at 47–55, 349–351, 363–367, 368–373, 374–376, 380–381, 381–382, 383–384, 384–387, 399–401, 404–407, 408–412, 424–426, decided that certain questions would *not* be asked by the defense, *id.*, at 414, 449–450, and decided which witnesses would not be called, *id.*, at 390, 415, 422. Against counsel's advice, Wiggins announced that the defense rested. *Id.*, at 413. Wiggins filed his own requested charges to the jury, *id.*, at 471–473, and made his own objections to the court's suggested charge, *id.*, at 473–478. He obtained the removal of one of the court's proposed charges over counsel's express objection, *id.*, at 478, approved the verdict form supplied to the jury, *id.*, at 479, and gave a closing argument to the jury, *id.*, at 490–497. Wiggins elected to go to the jury at the punishment phase of his trial, *id.*, at 69, and he argued his case to the jury at that stage as well, *id.*, at 540–541.

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venue (withdrawn by the defendant), *id.*, at 59, a motion for a speedy trial, *id.*, at 60, a motion for a jury shuffle, *id.*, at 67–68, and a motion for witness fees, *id.*, at 69–70.

[5] Wiggins made an opening statement to the venire, *id.*, at 101–103, and examined 33 individual venirepersons. *Id.*, at 106–185.

[6] These included a motion for acquittal, a motion to question a witness out of the presence of the jury, and a motion for the appointment of an investigator. *Id.*, at 342–344, 392–393, 394–395.

C

Wiggins' complaint is directed not at limits placed on *his* participation in the trial, for there clearly were none. It is directed instead at the allegedly inadequate limits placed on standby counsel's participation. At trial Wiggins objected to the very fact that counsel would remain available to assist him. *Id.*, at 66–67. Wiggins has abandoned that objection; he now contends only that his *Faretta* right to present his defense *pro se* was impaired by the distracting, intrusive, and unsolicited participation of counsel throughout the trial.

III

Wiggins claims, and the Court of Appeals agreed, that the *pro se* defendant may insist on presenting his own case wholly free from interruption or other uninvited involvement by standby counsel. Wiggins relies primarily on *Faretta*'s sole reference to standby counsel:

> "Of course, a State may—even over objection by the accused—appoint a 'standby counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary. See *United States* v. *Dougherty*, 154 U. S. App. D. C. 76, 87–89, 473 F. 2d 1113, 1124–1126." 422 U. S., at 835, n. 46.

Wiggins contends that the "if and when" language defines the limits on standby counsel's role. He argues that the *Faretta* right will be eviscerated if counsel is allowed to argue with the defendant, make motions to the court contrary to the defendant's wishes, and take other steps not specifically approved by the defendant.

In our view, both *Faretta*'s logic and its citation of the *Dougherty* case indicate that no absolute bar on standby counsel's unsolicited participation is appropriate or was intended. The right to appear *pro se* exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's best possible defense. Both of these objectives can be achieved without categorically silencing standby counsel.

In determining whether a defendant's *Faretta* rights have been respected, the primary focus must be on whether the defendant had a fair chance to present his case in his own way. *Faretta* itself dealt with the defendant's affirmative right to participate, not with the limits on standby counsel's additional involvement. The specific rights to make his voice heard that Wiggins was plainly accorded, see *supra*, at 174–175, form the core of a defendant's right of self-representation.

We recognize, nonetheless, that the right to speak for oneself entails more than the opportunity to add one's voice to a cacophony of others. As Wiggins contends, the objectives underlying the right to proceed *pro se* may be undermined by unsolicited and excessively intrusive participation by standby counsel. In proceedings before a jury the defendant may legitimately be concerned that multiple voices "for the defense" will confuse the message the defendant wishes to convey, thus defeating *Faretta*'s objectives.[7] Accordingly, the *Faretta* right must impose some limits on the extent of standby counsel's unsolicited participation.[8]

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[7] A *pro se* defendant must generally accept any unsolicited help or hindrance that may come from the judge who chooses to call and question witnesses, from the prosecutor who faithfully exercises his duty to present evidence favorable to the defense, from the plural voices speaking "for the defense" in a trial of more than one defendant, or from an *amicus* counsel appointed to assist the court, see *Brown* v. *United States*, 105 U. S. App. D. C. 77, 83, 264 F. 2d 363, 369 (1959) (Burger, J., concurring in part).

[8] Since the right of self-representation is a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant, its denial is not amenable to "harmless error" analysis. The right is either respected or denied; its deprivation cannot be harmless.

As a corollary, however, a defendant who exercises his right to appear *pro se* "cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'" *Faretta*, 422 U. S., at 835, n. 46. Moreover, the defendant's right to proceed *pro se*

First, the *pro se* defendant is entitled to preserve actual control over the case he chooses to present to the jury. This is the core of the *Faretta* right. If standby counsel's participation over the defendant's objection effectively allows counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak *instead* of the defendant on any matter of importance, the *Faretta* right is eroded.

Second, participation by standby counsel without the defendant's consent should not be allowed to destroy the jury's perception that the defendant is representing himself.[9] The defendant's appearance in the status of one conducting his own defense is important in a criminal trial, since the right to appear *pro se* exists to affirm the accused's individual dignity and autonomy. In related contexts the courts have recognized that a defendant has a right to be present at all important stages of trial, *Snyder* v. *Massachusetts*, 291 U. S. 97 (1934), that he may not normally be forced to appear in court in shackles or prison garb, *Estelle* v. *Williams*, 425 U. S. 501, 504–505 (1976), and that he has a right to present testi-

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exists in the larger context of the criminal trial designed to determine whether or not a defendant is guilty of the offense with which he is charged. The trial judge may be required to make numerous rulings reconciling the participation of standby counsel with a *pro se* defendant's objection to that participation; nothing in the nature of the *Faretta* right suggests that the usual deference to "judgment calls" on these issues by the trial judge should not obtain here as elsewhere.

[9] *Faretta* anticipated this second requirement. In its footnote on standby counsel *Faretta* cited three pages of *United States* v. *Dougherty*, 154 U. S. App. D. C. 76, 473 F. 2d 1113 (1972), in which we find this statement:

> "The utility of an amicus appointment is dependent on explanation to and cooperation by [the] defendant, and on understanding, too, that he may claim with some merit that his *pro se* rights include his right to appear before the jury in the status of one defending himself, and that this is defeated if a too conspicuous role is played by an attorney, unless it clearly appears to the jury that he does not have the status of defense counsel."

Id., at 88, 473 F. 2d, at 1125 (footnote omitted).

mony in his own behalf, see *Harris* v. *New York*, 401 U. S. 222, 225 (1971); *Brooks* v. *Tennessee*, 406 U. S. 605, 612 (1972). Appearing before the jury in the status of one who is defending himself may be equally important to the *pro se* defendant. From the jury's perspective, the message conveyed by the defense may depend as much on the messenger as on the message itself. From the defendant's own point of view, the right to appear *pro se* can lose much of its importance if only the lawyers in the courtroom know that the right is being exercised.

IV

Participation by standby counsel outside the presence of the jury engages only the first of these two limitations. A trial judge, who in any event receives a defendant's original *Faretta* request and supervises the protection of the right throughout the trial, must be considered capable of differentiating the claims presented by a *pro se* defendant from those presented by standby counsel. Cf. *United States* v. *Martinez*, 597 F. 2d 509, 510–511 (CA5), cert. denied, 444 U. S. 979 (1979); *United States* v. *Penick*, 496 F. 2d 1105, 1108 (CA7), cert. denied, 419 U. S. 897 (1974); *United States* v. *Reeves*, 348 F. 2d 469 (CA2 1965), cert. denied, 383 U. S. 929 (1966). Accordingly, the appearance of a *pro se* defendant's self-representation will not be unacceptably undermined by counsel's participation outside the presence of the jury.

Thus, *Faretta* rights are adequately vindicated in proceedings outside the presence of the jury if the *pro se* defendant is allowed to address the court freely on his own behalf and if disagreements between counsel and the *pro se* defendant are resolved in the defendant's favor whenever the matter is one that would normally be left to the discretion of counsel.[10]

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[10] Cf. ABA Standards For Criminal Justice 6–3.7 (2d ed. 1980) (standby counsel may "call the judge's attention to matters favorable to the accused upon which the judge should rule on his or her motion . . ."); Uniform Rule of Criminal Procedure 711 (1974) (same); *Mayberry* v. *Pennsylvania*, 400 U. S. 455, 467–468 (1971) (BURGER, C. J., concurring) (same).

Most of the incidents of which Wiggins complains occurred when the jury was not in the courtroom. In the jury's absence Wiggins' two standby counsel frequently explained to the trial judge their views and points of disagreement with Wiggins. Counsel made motions, dictated proposed strategies into the record,[11] registered objections to the prosecution's testimony, urged the summoning of additional witnesses, and suggested questions that the defendant should have asked of witnesses.

On several occasions Wiggins expressly adopted standby counsel's initiatives. When counsel moved to quash a jury panel, for example, Wiggins joined the motion. Record 81-82. Wiggins seconded counsel's requests for a police report and photographs. *Id.*, at 51–52, 54. At least twice, counsel made a motion, the motion was denied, and Wiggins then registered his exception to the denial.[12]

On several other occasions Wiggins strongly opposed the initiatives of counsel. He resisted counsel's suggestion that the trial be postponed so that the transcript of his prior trial could be prepared,[13] and he waived counsel's right to a 10-day preparation period, which counsel wished to invoke. *Id.*, at 64–66. In the course of a pretrial discussion concerning a discovery request Wiggins indignantly demanded that counsel not participate further without invitation. *Id.*, at 39–40. Later, Wiggins successfully opposed the inclusion in the jury instructions of a charge that counsel felt should be included. *Id.*, at 476–478.

The most acrimonious exchange between Graham and Wiggins occurred in the course of questioning a witness on *voir dire*. Wiggins suggests this exchange was typical of counsel's overbearing conduct, but he fails to place the incident in context. Wiggins had expressly agreed to have Graham conduct the *voir dire, id.,* at 210, but Wiggins attempted to take over the questioning in midstream. Plainly exasperated, Graham used profanity and curtly directed Wiggins to "[s]it down."[14]

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[11] Record 344–345, 414–415, 427–428, 449–450, 478.

[12] See *id.*, at 243, 246; 447, 449. On other occasions Wiggins simply did not react to standby counsel's participation. See, *e. g.*, *id.*, at 32.

[13] *Id.*, at 7–9. Wiggins later came to regret the unavailability of the transcript, and claimed that he had never waived his right to receive it. *Id.*, at 252–254.

Though several of these incidents are regrettable, we are satisfied that counsel's participation outside the presence of the jury fully satisfied the first standard we have outlined. Wiggins was given ample opportunity to present his own position to the court on every matter discussed. He was given time to think matters over, to explain his problems and concerns informally, and to speak to the judge off the record. Standby counsel participated actively, but for the most part in an orderly manner. The one instance of overbearing conduct by counsel was a direct result of Wiggins' own indecision as to who would question the witness on *voir dire.* Wiggins was given abundant opportunity to argue his contentions to the court.

Equally important, all conflicts between Wiggins and counsel were resolved in Wiggins' favor. The trial judge repeatedly explained to all concerned that Wiggins' strategic choices, not counsel's, would prevail. *Id.,* at 12–13, 65, 210, 223–224, 306–308, 341–342, 345–346, 414–415, 427, 430, 450, 477–478. Not every motion made by Wiggins was granted, but in no instance was counsel's position adopted over Wiggins' on a matter that would normally be left to the defense's discretion.

V

Participation by standby counsel in the presence of the jury is more problematic. It is here that the defendant may legitimately claim that excessive involvement by counsel will destroy the appearance that the defendant is acting *pro se.*

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[14] *Id.,* at 215, 218, 223. Wiggins was given a full opportunity to question the witness when Graham had finished. *Id.,* at 224–226, 228–237.

This, in turn, may erode the dignitary values that the right to self-representation is intended to promote and may undercut the defendant's presentation to the jury of his own most effective defense. Nonetheless, we believe that a categorical bar on participation by standby counsel in the presence of the jury is unnecessary.

A

In measuring standby counsel's involvement against the standards we have described, it is important not to lose sight of the defendant's own conduct. A defendant can waive his *Faretta* rights. Participation by counsel with a *pro se* defendant's express approval is, of course, constitutionally unobjectionable. A defendant's invitation to counsel to participate in the trial obliterates any claim that the participation in question deprived the defendant of control over his own defense. Such participation also diminishes any general claim that counsel unreasonably interfered with the defendant's right to appear in the status of one defending himself.

Although this is self-evident, it is also easily overlooked. A defendant like Wiggins, who vehemently objects at the beginning of trial to standby counsel's very presence in the courtroom, may express quite different views as the trial progresses. Even when he insists that he is not waiving his *Faretta* rights, a *pro se* defendant's solicitation of or acquiescence in certain types of participation by counsel substantially undermines later protestations that counsel interfered unacceptably.

The record in this case reveals that Wiggins' *pro se* efforts were undermined primarily by his own, frequent changes of mind regarding counsel's role. Early in the trial Wiggins insisted he wished to proceed entirely without assistance, but shortly thereafter he expressly agreed that counsel should question a witness on *voir dire*. Wiggins objected vehemently to some of counsel's motions, but warmly embraced others. Initially Wiggins objected to standby counsel's presence; later he refused to allow the trial to proceed in their absence; in the end he agreed that counsel would make a closing statement for the defense. The only two long appearances by counsel at Wiggins' trial, one before the jury and one outside its presence, were both initiated with Wiggins' express approval. Record 210–223, 241–243; 486–489. In these circumstances it is very difficult to determine how much of counsel's participation was in fact contrary to Wiggins' desires of the moment.

Faretta does not require a trial judge to permit "hybrid" representation of the type Wiggins was actually allowed. But if a defendant is given the opportunity and elects to have counsel appear before the court or jury, his complaints concerning counsel's subsequent unsolicited participation lose much of their force. A defendant does not have a constitutional right to choreograph special appearances by counsel. Once a *pro se* defendant invites or agrees to any substantial participation by counsel, subsequent appearances by counsel must be presumed to be with the defendant's acquiescence, at least until the defendant expressly and unambiguously renews his request that standby counsel be silenced.

B

Faretta rights are also not infringed when standby counsel assists the *pro se* defendant in overcoming routine procedural or evidentiary obstacles to the completion of some specific task, such as introducing evidence or objecting to testimony, that the defendant has clearly shown he wishes to complete. Nor are they infringed when counsel merely helps to ensure the defendant's compliance with basic rules of courtroom protocol and procedure. In neither case is there any significant interference with the defendant's actual control over the presentation of his defense. The likelihood that the defendant's appearance in the status of one defending himself will be eroded is also slight, and in any event it is tolerable. A defendant does not have a constitutional right to receive personal instruction from the trial judge on courtroom procedure. Nor does the Constitution require judges to take over chores for a *pro se* defendant that would normally be attended to by trained counsel as a matter of course. *Faretta* recognized as much. "The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law." 422 U. S., at 835, n. 46.

Accordingly, we make explicit today what is already implicit in *Faretta:* A defendant's Sixth Amendment rights are not violated when a trial judge appoints standby counsel—even over the defendant's objection—to relieve the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of the defendant's achievement of his own clearly indicated goals. Participation by counsel to steer a defendant through the basic procedures of trial is permissible even in the unlikely event that it somewhat undermines the *pro se* defendant's appearance of control over his own defense.

At Wiggins' trial a significant part of standby counsel's participation both in and out of the jury's presence involved basic mechanics of the type we have described—informing the court of the whereabouts of witnesses, supplying Wiggins with a form needed to elect to go to the jury at the punishment phase of trial, explaining to Wiggins that he should not argue his case while questioning a witness, and so on. See Record 9, 11–12, 45, 50, 69, 191, 206, 232, 251, 254, 255, 391, 393, 396, 404, 406, 471. When Wiggins attempted to introduce a document into evidence, but failed to mark it for identification or to lay a predicate for its introduction, counsel, at the trial court's suggestion, questioned the witness to lay an appropriate predicate, and Wiggins then resumed his examination. *Id.*, at 293–296. Similarly, the trial judge repeatedly instructed Wiggins to consult with counsel, not with the court, regarding the appropriate procedure for summoning witnesses. *Id.*, at 204–205, 207–208, 248, 272, 395, 396, 402.

Notwithstanding Wiggins' several general objections to the presence and participation of counsel, we find these aspects of counsel's involvement irreproachable. None interfered with Wiggins' actual control over his defense; none can reasonably be thought to have undermined Wiggins' appearance before the jury in the status of a *pro se* defendant.

C

Putting aside participation that was either approved by Wiggins or attendant to routine clerical or procedural matters, counsel's unsolicited comments in front of the jury were infrequent and for the most part innocuous. On two occasions Graham interrupted a witness' answer to a question put by Wiggins. *Id.*, at 204, 287. The first interruption was trivial. When the second was made the jury was briefly excused and subsequently given a cautionary instruction as requested by Graham. Wiggins made no objection. Standby counsel also moved for a mistrial three times in the presence of the jury. *Id.*, at 262, 421–422, 498–499. Each motion was in response to allegedly prejudicial questions or comments by the prosecutor. Wiggins did not comment on the first motion, but he opposed the following two. All three motions were immediately denied by the trial court. Regrettably, counsel used profanity to express his exasperation on the second occasion.[15] Finally, counsel played an active role at the punishment phase of the trial. The record supplies no explanation for the sudden change in this regard. Wiggins made no objection to counsel's participation in this phase of the trial. We can only surmise that by then Wiggins had concluded that appearing *pro se* was not in his best interests.

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[15] "MR. GRAHAM: Objection, Your Honor. The district attorney is testifying.

"THE COURT: Don't lead.

"MR. GRAHAM: I ask the Court to instruct the jury to disregard the remarks of counsel as not being testimony in the case.

"THE COURT: The Court will instruct the jury to disregard the last statement made by Mr. Rodriguez.

"MR. GRAHAM: Notwithstanding the Court's instruction, I am sure it is so prejudicial as to require a mistrial.

"DEFENDANT: No, Your Honor. I object to a mistrial. I object to counsel—

"THE COURT: I denied the motion for mistrial. Overruled.

"MR. GRAHAM: Jesus Christ." *Id.*, at 421–422.

The statements made by counsel during the guilt phase of the trial, in the presence of the jury and without Wiggins' express consent, occupy only a small portion of the transcript. Most were of an unobjectionable, mechanical sort. While standby counsel's participation at Wiggins' trial should not serve as a model for future trials, we believe that counsel's involvement fell short of infringing on Wiggins' *Faretta* rights. Wiggins unquestionably maintained actual control over the presentation of his own defense at all times.

We are also persuaded that Wiggins was allowed to appear before the jury in the status of one defending himself. At the outset the trial judge carefully explained to the jury that Wiggins would be appearing *pro se*. Record 84. Wiggins, not counsel, examined prospective jurors on *voir dire*, cross-examined the prosecution's witnesses, examined his own witnesses, and made an opening statement for the defense. Wiggins objected to the prosecutor's case at least as often as did counsel. If Wiggins' closing statement to the jury had to compete with one made by counsel, it was only because Wiggins agreed in advance to that arrangement.

By contrast, counsel's interruptions of Wiggins or witnesses being questioned by Wiggins in the presence of the jury were few and perfunctory. Most of counsel's uninvited comments were directed at the prosecutor.[16] Such interruptions present little threat to a defendant's *Faretta* rights, at least when the defendant's view regarding those objections has not been clearly articulated. On the rare occasions that disagreements between counsel and Wiggins were aired in the presence of the jury the trial judge consistently ruled in Wiggins' favor. This was a pattern more likely to reinforce than to detract from the appearance that Wiggins was controlling his own defense.[17] The intrusions by counsel at Wiggins' trial were simply not substantial or frequent enough to have seriously undermined Wiggins' appearance before the jury in the status of one representing himself.

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[16] Graham registered about 15 objections during the course of the prosecutor's questioning of witnesses and closing argument. *Id.*, at 196, 261–262, 301, 302, 304, 339–340, 420–421, 498, 501. These involved pedestrian matters such as hearsay, leading the witness, calling for a conclusion, evidence not in the record, and so on. All but one, *id.*, at 339–340, were

VI

Faretta affirmed the defendant's constitutional right to appear on stage at his trial. We recognize that a *pro se*

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made without comment from Wiggins, and most were sustained by the trial judge without argument from the prosecutor. We note that at his first trial Wiggins, when asked, agreed that standby counsel should make objections without first consulting Wiggins. *Id.*, at 37a. On several occasions at the second trial Wiggins expressly joined counsel's objections or motions.

[17] It might be suggested that the very fact that the trial was interrupted several times by standby counsel prevented Wiggins from presenting his own defense effectively to the jury. This line of argument does not withstand scrutiny here. By our count the jury left the courtroom 15 times between the time when the indictment was read and the time when the jury retired to deliberate on the question of guilt. As best we can tell, four of these interruptions were caused by standby counsel, *id.*, at 287, 307, 341, 413, four by Wiggins himself, *id.*, at 356, 389, 393, 403, and seven by the court. *Id.*, at 207, 244, 327, 373, 392, 424. Likewise, we count 15 conferences, off-the-record but in the presence of the jury, between Wiggins and his counsel. Eight appear to have been initiated by Wiggins, *id.*, at 191, 201, 333, 340, 384, 406 (two), 450, and four by standby counsel, *id.*, at 340, 407, 415, 469; we cannot determine who initiated the remaining three, *id.*, at 280, 337, 412. Certainly the trial judge expressed his view that Wiggins himself was responsible for most of the delays and interruptions. *Id.*, at 397. In these circumstances, the interruptions caused by standby counsel did not significantly detract from Wiggins' control, or appearance of control, over his *pro se* defense.

defendant may wish to dance a solo, not a *pas de deux*. Standby counsel must generally respect that preference. But counsel need not be excluded altogether, especially when the participation is outside the presence of the jury or is with the defendant's express or tacit consent. The defendant in this case was allowed to make his own appearances as he saw fit. In our judgment counsel's unsolicited involvement was held within reasonable limits.

The judgment of the Court of Appeals is therefore

Reversed.

JUSTICE BLACKMUN concurs in the result.

JUSTICE WHITE, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

Just as the Sixth Amendment accords an accused a fundamental right to the assistance of counsel, so also, this Court has recognized, it embodies "the correlative right to dispense with a lawyer's help," *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 279 (1942), and to manage one's own defense. *Faretta* v. *California*, 422 U. S. 806 (1975). It is, I believe, "undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts." *Id.*, at 834. Nevertheless, "*Faretta* establishes that the right to counsel is more than a right to have one's case presented competently and effectively." *Jones* v. *Barnes*, 463 U. S. 745, 759 (1983) (BRENNAN, J., dissenting). "The right to defend is personal," *Faretta*, 422 U. S., at 834, and the text and structure of the Sixth Amendment, as well as the common-law jurisprudence from which the Amendment emerged, comport with "a nearly universal conviction, on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so." *Id.*, at 817. Thus, an accused who knowingly, intelligently, and voluntarily elects to do so is constitutionally entitled to refuse the services of a government-appointed attorney and to develop and present his own defense. *Id.*, at 835–836.

I

After granting Wiggins' request that he be allowed to represent himself, the trial court designated his two appointed attorneys as standby counsel and made it clear that they served in a purely advisory capacity. One of the attorneys soon began to assume a more active role in the proceedings, and Wiggins protested that counsel's unsolicited participation was frustrating the conduct of his defense. The trial court informed Wiggins that he would receive counsel's aid whether he wanted it or not,[1] and it refused to instruct standby counsel not to volunteer their assistance without a request from Wiggins.[2]

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[1] "DEFENDANT: Your Honor, I would like to defend myself. I would appreciate it, sir if you would ask this man to let me defend myself.

"MR. GRAHAM: Certainly. Help yourself.

"DEFENDANT: I would be grateful. I have not solicited his assistance, Your Honor, and I don't want it.

"THE COURT: You are going to get help and/or assistance from him because you are obviously not a lawyer.

"DEFENDANT: Yes sir. I am not a lawyer.

"THE COURT: And this trial, if we do go into it, is going to be conducted according to the rules of law.

"DEFENDANT: Yes sir.

"THE COURT: And there might be an occasion when this Court is going to require that you consult with them as to what the proper procedure may be.

"DEFENDANT: Yes sir.

"THE COURT: You will have every right made available to you under the law, as this Court is able to determine.

"DEFENDANT: I appreciate that, Your Honor, but for assistant counsel to initiate something that the defendant does not want, I would like to consult the attorneys for advice. I will appreciate that, but for counsels *[sic]* to initiate something that is contrary to the defendant's defense, well, then, I couldn't appreciate that." App. A–8—A–9.

[2] "THE COURT: You are waiving the ten days as far as Mr. Graham is concerned?

"THE DEFENDANT: Yes, Your Honor.

[Footnote 2 is continued on p. 190]

Wiggins, on his own, made numerous pretrial motions, directly examined his own witnesses, cross-examined the State's witnesses, and attempted to argue his case to the jury

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"THE COURT: The basis of that is that you expect to be an attorney for yourself pro se?

"DEFENDANT: Yes, Your Honor. In fact, not only that, I would like to waive his assistance, if I may.

"THE COURT: The Court is not going to relieve you of that. Now, you can use it or not use it. It's available to you in this case.

"DEFENDANT: Yes sir, but I would ask the court to ask Mr. Graham not to take the initiative to interfere with the defendant here, if I may do that?

"THE COURT: Well—

"DEFENDANT: I mean, if I want Mr. Graham's help I will ask for it and appreciate it if he wouldn't volunteer without me asking for it.

"THE COURT: Well, Mr. Graham is a competent attorney and he has much experience in this type of thing and I am sure what he is trying to do is what he thinks is best for you. I am not going to order him to do or not to do anything. If some problem or situation arises, I will act on it at that time. I am not going to order him not to.

"DEFENDANT: Your Honor, do I understand that the Court is forcing the services of Mr. Graham on the defendant?

"THE COURT: His availability, yes.

"DEFENDANT: May I except to that, Your Honor?" *Id.*, at A-13—A-14.

After numerous disagreements between Wiggins and counsel, Wiggins was again moved to request the assistance of the trial court:

"DEFENDANT: May I say it is peculiar to me, Your Honor and I would really appreciate it if I could . . . conduct my defense without the assistance and interruptions of counsel, with all respect, Mr. Graham.

"THE COURT: All right.

"MR. GRAHAM: I will sit third chair from now on. I will move back one notch.

"THE COURT: I am not going to order you Mr. Graham, because I know you are competent counsel, but let me suggest to you that unless he consults with you—you do your own thing anyway, but don't object or don't ask questions unless and until the Court requests that you consult with him because he doesn't know the proper way to do something." *Id.*, at A-30—A-31. See also Record 345-346.

Notwithstanding this admonition, counsel continued to act of his own accord and to disrupt the presentation of Wiggins' defense throughout the trial.

at both stages of the bifurcated trial. But the trial did not go smoothly, for standby counsel "continuously participated in the proceedings, both in and outside the presence of the jury." *Wiggins* v. *Estelle*, 681 F. 2d 266, 269–270, rehearing denied, 691 F. 2d 213 (CA5 1982). In addition to making objections and motions too numerous to cite, counsel argued with Wiggins, moved for a mistrial against his wishes at several points during the trial, and twice cursed, once in the presence of the jury.

Although petitioner characterizes counsel's participation as "limited" and "intermittent," nothing could be further from the truth. Standby counsel intervened in a substantial manner without Wiggins' permission well over 50 times during the course of the 3-day trial; many of these interruptions precipitated direct conflicts between Wiggins and counsel, often in the presence of the jury. See App. A–3—A–54. Although the trial court appears to have resolved the conflicts calling for a ruling in Wiggins' favor, their mere existence disrupted the proceedings and turned the trial into an ordeal through which the jury was required to suffer. See, *e. g.*, *id.*, at A–29; Record 423. At several points during the trial, moreover, counsel blatantly interfered with Wiggins' attempt to present his defense in a manner not calling for a ruling from the bench, see, *e. g.*, App. A–20, and we of course have no way of knowing the extent to which Wiggins' defense was subtly undermined or adversely affected by counsel's extensive unsolicited participation.

The Court of Appeals had little trouble concluding that counsel's conduct, expressly and tacitly approved by the trial court, prevented Wiggins from conducting his own defense. Although the Court of Appeals recognized that trial courts are empowered to appoint standby counsel for *pro se* defendants, it declared that "court-appointed standby counsel is 'to be seen, but not heard.'" 681 F. 2d, at 273. Standby counsel, the Fifth Circuit made clear, "is not to compete with the defendant or supersede his defense. Rather, his presence is . . . for advisory purposes only, to be used or not used as the defendant sees fit." *Ibid.* (footnotes omitted).

The court recognized that in some cases counsel's interjections will be "few and innocuous"; reversal is not necessary "every time overzealous counsel, acting in the best interests of his client, volunteer[s] his aid without prior permission." *Id.*, at 274. But the continuous and substantial intervention of standby counsel, despite Wiggins' repeated demands that he play a passive role, could not have had "anything but a negative impact on the jury. It also destroyed Wiggins' own perception that he was conducting *his* defense." *Id.*, at 275 (emphasis in original). The Court of Appeals thus held that the State had failed to demonstrate that Wiggins had not been prejudiced by counsel's participation and that he was entitled to relief.

Disagreeing with the Court in several respects, I would affirm the judgment of the Court of Appeals.

II

The Court holds that the seen-but-not-heard standard used by the Court of Appeals in determining whether standby counsel improperly encroached on Wiggins' right of self-representation is too rigid and too restrictive on the conduct of standby counsel. As indicated above, however, the Court of Appeals would not hold that every instance of volunteered assistance or even every series of such instances would violate a defendant's rights. Nor, as I understand it, would the Court of Appeals' holding prevent a trial judge from directing a defendant to consult with standby counsel where necessary for the proper conduct of the trial or from insisting that a defendant agree to some ground rules with respect to when standby counsel could inject himself into the trial. I agree that the trial judge himself should not be burdened with educating the defendant in trial procedure and that he should be able to insist that the defendant learn what he needs to know from standby counsel. The judgment below is not to the contrary. In my view, the Court of Appeals announced a proper standard, one that is wholly consistent with *Faretta*'s ruling that "a State may—even over objection by the accused—appoint a 'standby counsel' to aid the accused if and when the accused requests help," *Faretta* v. *California*, 422 U. S., at 835, n. 46, and applied it in an acceptable way. In any event, it seems to me that the Court proffers a poor substitute for the approach of the Court of Appeals.

III

As the Court observes, *ante*, at 173, *Faretta* presented a situation in which the trial court wholly denied a defendant's request to proceed *pro se* and required him to address the State's charges only through his appointed attorney. Wiggins, unlike Faretta, was allowed to proceed *pro se* and took an active role in his trial. The Court concludes, on the basis of its examination of the record, that Wiggins was afforded "a fair chance to present his case in his own way," *ante*, at 177, and that "counsel's unsolicited involvement was held within reasonable limits," *ante*, at 188. It arrives at this conclusion by applying a two-part test that, in my judgment, provides little or no guidance for counsel and trial judges, imposes difficult, if not impossible, burdens on appellate courts, and undoubtedly will lead to the swift erosion of defendants' constitutional right to proceed *pro se*.

Under the Court's new test, it is necessary to determine whether the *pro se* defendant retained "actual control over the case he [chose] to present to the jury," *ante*, at 178, and whether standby counsel's participation "destroy[ed] the jury's perception that the defendant [was] representing himself," *ibid.* Although this test purports to protect all of the values underlying our holding in *Faretta*, it is unclear whether it can achieve this result.

As long as the *pro se* defendant is allowed his say, the first prong of the Court's test accords standby counsel at a bench trial or any proceeding outside the presence of a jury virtually untrammeled discretion to present any factual or legal argument to which the defendant does not object. The limits placed on counsel's participation in this context by the "actual control" test are more apparent than real. First, counsel may not "make or substantially interfere with any significant tactical decisions." *Ibid.* Unless counsel directly overrides a defendant's strategy in the presence of the judge, however, it is apparent that courts will be almost wholly incapable of assessing the subtle and not-so-subtle effects of counsel's participation on the defense. Second, the Court suggests that conflicts between the *pro se* defendant and standby counsel on "matter[s] that would normally be left to the defense's discretion," *ante*, at 181, will be resolved in the defendant's favor. But many disagreements will not produce direct conflicts requiring a trial court to choose one position over another. Under the Court's opinion, the burden apparently will fall on the *pro se* defendant to comprehend counsel's submissions and to create conflicts for the trial court to resolve. If applied this way, the Court's test surely will prove incapable of safeguarding the interest in individual autonomy from which the *Faretta* right derives.

Although the Court is more solicitous of a *pro se* defendant's interests when standby counsel intervenes before a jury, the test's second prong suffers from similar shortcomings. To the extent that trial and appellate courts can discern the point at which counsel's unsolicited participation substantially undermines a *pro se* defendant's appearance before the jury, a matter about which I harbor substantial doubts, their decisions will, to a certain extent, "affirm the accused's individual dignity and autonomy." *Ante*, at 178. But they will do so incompletely, for in focusing on how the jury views the defendant, the majority opinion ignores *Faretta*'s emphasis on the defendant's own perception of the criminal justice system, *Faretta* v. *California*, *supra*, at 834, and implies that the Court actually adheres to the result-oriented harmless-error standard it purports to reject. *Ante*, at 177–178, n. 8.

As a guide for standby counsel and lower courts, moreover, the Court's two-part test is clearly deficient. Instead of encouraging counsel to accept a limited role, the Court plainly invites them to participate despite their clients' contrary instructions until the clients renew their objections and trial courts draw the line. Trial courts required to rule on *pro se* defendants' objections to counsel's intervention also are left at sea. They clearly must prevent standby counsel from overtly muzzling their *pro se* clients and resolve certain conflicts in defendants' favor. But the Court's opinion places few, if any, other clear limits on counsel's uninvited participation; instead it requires trial courts to make numerous subjective judgments concerning the effect of counsel's actions on defendants' *Faretta* rights. Because trial courts generally will consider only isolated actions of standby counsel expressly challenged by *pro se* defendants, only appellate courts may be in a position to form impressions on the basis of the entire trial. These courts, however, also will suffer from the lack of clear standards and from their inability or unwillingness to make the factual inquiries necessitated by the Court's two-part test.

In short, I believe that the Court's test is unworkable and insufficiently protective of the fundamental interests we recognized in *Faretta*.

IV

The inappropriateness of the Court's standard is made manifest by the Court's conclusion that the conduct of standby counsel in this case passes muster under that standard. In frequently and grievously exceeding the proper role of standby counsel, the more active of Wiggins' appointed attorneys distracted Wiggins and usurped his prerogatives,[3]

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[3] As has been cogently observed in a related context:

"[N]umerous strategic and tactical decisions must be made in the course of a criminal trial, many of which are made in circumstances that do not allow extended, if any, consultation. Every experienced advocate can recall the disconcerting experience of trying to conduct the examination of a witness altered the tenor of the defense, disrupted the trial,[4] undermined Wiggins' perception that he controlled his own fate, *Faretta* v. *California*, 422 U. S., at 834, induced a belief—most assuredly unfounded, but sincerely held nevertheless—that "the law contrive[d] against him," *ibid.;* see App. A-78—A-81; Record 679, 700–701, 716–717, and undoubtedly reduced Wiggins' credibility and prejudiced him in the eyes of the jury. In allowing such intervention to continue despite Wiggins' repeated requests that it cease, the trial court clearly denied Wiggins' right of self-representation. The right to present and control one's own defense means little indeed if one's "standby" attorneys remain free to take any action they choose, whether consistent with the desired defense or inimical to it, at any point during the trial. In short, whatever advantage or satisfaction Wiggins might have hoped to derive from self-representation, see, *e. g.*, ABA Standards for Criminal Justice 6–3.6(a) (2d ed. 1980), was surely nullified by the trial court's tolerance of counsel's conduct.

The Court reaches a different conclusion by pinning the blame for the interference with the right to proceed *pro se* on Wiggins himself and by dissecting counsel's activities into discrete categories and failing to consider their overall impact. These tactics, of course, both required the Court to do its own factfinding, a function normally left for district courts. Neither approach can withstand scrutiny. Particu-

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or follow opposing arguments or the judge's charge while the client 'plucks at the attorney's sleeve' offering gratuitous suggestions." ABA Standards for Criminal Justice 4–5.2 (2d ed. 1980).

[4] Among other things, standby counsel's actions created a need for numerous conferences out of the hearing of the jury. The disruptive, vexatious, and possibly prejudicial effects of repeated bench conferences have long been recognized, *id.*, 15–3.9, and indeed were expressly acknowledged by the trial court. See, *e. g.*, Record 423. The Court's attempt to attribute many of these interruptions solely to Wiggins' conduct is unpersuasive.

larly when the trial court has expressly refused to order standby counsel to serve in a purely advisory capacity, a *pro se* defendant cannot reasonably be expected to object to counsel's every action. Not only would the trial court's initial decision tend to impress upon the defendant the futility of continuing objections, but also repeated objections could destroy the impression the defendant seeks to convey to the jury. Accordingly, a defendant's acquiescence in a violation of his *Faretta* right should not immunize that violation from judicial review. Similarly, the fact that a *pro se* defendant, with the trial court's approval, has authorized standby counsel to perform a discrete representational function should not give rise to a presumption that the defendant also has sanctioned subsequent interference in the conduct of the trial. In any event, the most glaring intrusions by counsel occurred without Wiggins' blessing.[5]

Considered in isolation, many types of interference by standby counsel in a *pro se* defense will likely appear inconsequential. The Court's desire to compartmentalize counsel's actions, while understandable, has, in my view, led it to ignore the cumulative effect of counsel's frequent participation on Wiggins' right to defend himself. To the extent that the Court rests on the proposition that not every transgression of standby counsel constitutes reversible error, I have no quarrel with its reasoning. A trial court's tolerance of isolated and innocuous participation by standby counsel could perhaps be characterized—in line with the Court of Appeals' holding—as harmless constitutional error; one also could conclude that such participation simply does not rise to the level of a constitutional violation. The second formulation is clearly preferable,[6] but it is unnecessary to choose between them to resolve this case since Wiggins should prevail under either view.

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[5] Although the Court attributes counsel's extensive participation in the penalty phase of the trial to a conclusion by Wiggins that appearing *pro se* was not in his best interests, an equally plausible assumption is that Wiggins simply gave up his attempted self-representation as a result of the trial court's approval of counsel's repeated interruptions in the guilt phase.

V

It also seems to me that if a standard different from that applied by the Court of Appeals is to govern this case, the

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[6] "The nature of the right to defend pro se renders the traditional harmless error doctrine peculiarly inapposite. Unlike other constitutional rights, the right to represent oneself is not 'result-oriented.' The normal operation of the harmless error doctrine is in cases where the challenged error concerns a right accorded the defendant to facilitate his defense or to insulate him from suspect evidence. . . . By contrast, we recognize the defendant's right to defend pro se not primarily out of the belief that he thereby stands a better chance of winning his case, but rather out of deference to the axiomatic notion that each person is ultimately responsible for choosing his own fate, including his position before the law. A defendant has the moral right to stand alone in his hour of trial and to embrace the consequences of that course of action." *Chapman* v. *United States*, 553 F. 2d 886, 891 (CA5 1977) (footnote omitted).

See *Moreno* v. *Estelle*, 717 F. 2d 171, 173, n. 1 (CA5 1983); *Bittaker* v. *Enomoto*, 587 F. 2d 400, 402–403 (CA9 1978), cert. denied, 441 U. S. 913 (1979); *United States* v. *Dougherty*, 154 U. S. App. D. C. 76, 90–93, 473 F. 2d 1113, 1127–1130 (1972); *United States* v. *Plattner*, 330 F. 2d 271, 273 (CA2 1964); *People* v. *Tyner*, 76 Cal. App. 3d 352, 356, 143 Cal. Rptr. 52, 54 (1977). But see *People* v. *Sharp*, 7 Cal. 3d 448, 462–463, 499 P. 2d 489, 498 (1972), cert. denied, 410 U. S. 944 (1973); *Burney* v. *State*, 244 Ga. 33, 37, 257 S. E. 2d 543, 547, cert. denied, 444 U. S. 970 (1979); *State* v. *Kirby*, 198 Neb. 646, 648–649, 254 N. W. 2d 424, 426 (1977). See also *Walker* v. *Loggins*, 608 F. 2d 731, 736 (CA9 1979) (Carter, J., dissenting).

As is the case when the trial court completely denies a defendant's right of self-representation, application of the result-oriented harmless-error standard to cases like this one, where the defendant was allowed to proceed *pro se* but the conduct of his appointed standby counsel inhibited his ability to do so, would result in the denigration of the right. If counsel's interference can be characterized as *de minimis*, it is more consistent with the nature of the right of self-representation to conclude that no violation occurred than to say that the violation was harmless constitutional error. If, as is the case here, counsel acted with substantial autonomy and significantly interfered with the *pro se* defendant's presentation of his defense, reversal should follow automatically without any inquiry into the question whether the constitutional violation likely affected the outcome of the trial.

Court should be content with announcing it and remanding to the Court of Appeals for reconsideration in light of that standard, rather than itself undertaking to apply the new standard in the first instance. That course would more comport with the proper roles and functions of both this Court and the courts of appeals.

With all due respect, I dissent and would affirm the judgment of the Court of Appeals.

ANTONE *v.* DUGGER, SUPERINTENDENT, FLORIDA STATE PRISON, ET AL.

ON APPLICATION FOR STAY AND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 83-6155 (A-599). Decided January 25, 1984

In 1976, applicant was convicted in a Florida state court of first-degree murder and was sentenced to death. The Florida Supreme Court ultimately affirmed, and this Court denied certiorari. Applicant was also a party to an unsuccessful state-court suit challenging the Florida Supreme Court's use of extra-record materials in conducting proportionality review of death sentences. In 1982, the trial court denied applicant's motions for postconviction relief, and the Florida Supreme Court affirmed. Applicant also sought habeas corpus relief in Federal District Court, which denied relief. The Court of Appeals ultimately affirmed, and this Court denied certiorari. After applicant's execution was set for January 24, 1984, his second state-court application for postconviction relief was denied, and the Florida Supreme Court affirmed. That court also denied applicant's petition for extraordinary relief. Applicant then filed a second habeas petition in Federal District Court, which again denied relief. The Court of Appeals held that the District Court was correct in dismissing applicant's petition on the grounds that it presented successive claims that had been previously considered, and constituted an abuse of the writ as to any "new" claims since they should have been raised on the first habeas petition. However, the Court of Appeals granted a temporary stay of execution until January 25, at 12 noon, to afford applicant an opportunity to apply to this Court for a stay of execution. After the Court of Appeals denied a petition for rehearing, a suggestion for rehearing en banc, and an application for a stay pending rehearing, applicant filed with this Court a petition for writ of certiorari and an application for a stay of execution pending consideration of the petition.

Held: With respect to the claims for relief that applicant presented for the first time on his second habeas petition, the District Court and the Court of Appeals properly found that presentation of the claims constituted an abuse of the writ. As applicant had presented the claims to the state courts before the first habeas petition was filed, he cannot properly contend that the claims were unknown to him at that time. Nor has applicant shown any basis for disagreeing with the finding of the District

Court and the Court of Appeals that the ends of justice would not be served by reconsideration of those claims previously presented on federal habeas. The federal and state courts carefully and repetitively have reviewed applicant's challenges to his conviction and sentence.

Certiorari and application for stay denied.

PER CURIAM.

We consider an application for a stay of execution that had been set for January 24, 1984, at 7 a. m., and a petition for writ of certiorari. The Court of Appeals for the Eleventh Circuit granted a temporary stay until January 25, at 12 noon, to afford applicant an opportunity to apply to this Court for a stay of execution. At the same time, the Court of Appeals denied applicant's request for issuance of a certificate of probable cause and his application for an indefinite stay of execution.[1] The application and petition now before us were not filed until January 25, shortly after the expiration of the temporary stay.[2] The State has filed an opposition to the pending application.

I

On August 27, 1976, a jury convicted applicant of first-degree murder. He was sentenced to death. The evidence upon which the conviction was based showed that applicant had planned the "contract murder" of a Tampa police officer, apparently to prevent the officer from testifying at a grand jury investigation of "Mob" activities.

On the first appeal, the Florida Supreme Court remanded for a hearing on the question whether the failure to disclose an attorney's-fees arrangement between the State and one of the prosecution witnesses had violated applicant's due process rights under *Brady* v. *Maryland*, 373 U. S. 83 (1963), and *United States* v. *Agurs*, 427 U. S. 97 (1976). *Antone* v. *State*, 355 So. 2d 777 (1978). The trial court found that there was no violation. On the second appeal, the Florida Supreme Court affirmed the conviction. *Antone* v. *State*, 382 So. 2d 1205 (1980). This Court denied certiorari. 449 U. S. 913 (1980).

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[1] Applicant then filed a motion with the Court of Appeals suggesting a rehearing en banc and requesting a further stay. This motion and request were denied by the Court of Appeals on January 25.

[2] Applicant lodged papers with this Court on January 20, while his petition for a writ of habeas corpus was pending before the District Court, but no formal filing for relief here occurred until today.

Applicant was also a party to an unsuccessful suit challenging the Florida Supreme Court's use of extra-record materials in conducting proportionality review of death sentences. *Brown* v. *Wainwright*, 392 So. 2d 1327 (1981), cert. denied, 454 U. S. 1000 (1981). (This practice was also challenged in *Ford* v. *Strickland*, 696 F. 2d 804 (CA11), cert. denied, 464 U. S. 865 (1983); applicant was not a party to that litigation.)

On January 6, 1982, applicant's execution was set for February 5, 1982. He then brought two motions for postconviction relief in state court. The motions raised a number of claims, including ineffective assistance of counsel, further *Brady* violations, and challenges to applicant's arrest under *Payton* v. *New York*, 445 U. S. 573 (1980), and to the constitutionality of the death penalty statute, as well as various challenges to the selection of the jury and the trial proceedings. After an evidentiary hearing, the trial court denied relief, and the Florida Supreme Court affirmed. *Antone* v. *Strickland*, 410 So. 2d 157 (1982).

On January 22, 1982, applicant filed a petition for a writ of habeas corpus in the District Court for the Middle District of Florida. On January 29, 1982, after oral argument, the District Court denied the petition. The Court of Appeals granted a stay and remanded to the District Court for further consideration of applicant's claims. On remand, the District Court again denied relief, and the Court of Appeals affirmed. *Antone* v. *Strickland*, 706 F. 2d 1534 (CA11 1983). This Court denied certiorari on November 28, 1983, 464 U. S. 1003, and denied a petition for rehearing on January 9, 1984, 464 U. S. 1064.

II

On January 4, 1984, the Governor signed a warrant for the execution of applicant between noon Friday, January 20, and noon Friday, January 27. The execution was subsequently set for January 24, 1984, at 7 a. m.

On January 17, applicant filed a second motion for postconviction relief in the state courts, alleging ineffective assistance at the penalty stage of his trial and unconstitutionality of the Florida death penalty statute under *Lockett* v. *Ohio*, 438 U. S. 586 (1978). The motion was denied. On Friday afternoon, January 20, the Florida Supreme Court affirmed, noting that these claims had been considered and rejected in applicant's prior postconviction proceeding. Applicant also filed a "petition for extraordinary relief" in the Florida Supreme Court, questioning the propriety of that court's use of extra-record materials in reviewing death sentences. The State Supreme Court denied the petition, again noting that applicant's claim previously had been considered by the court in *Brown* v. *Wainwright, supra,* and by the Court of Appeals for the Eleventh Circuit in *Antone* v. *Strickland, supra.*

Applicant then filed a second petition for a writ of habeas corpus in the District Court on January 20. Of the claims presented in that petition, applicant previously had raised in his first federal habeas petition the contentions that trial counsel was ineffective and that the State unjustifiably withheld testimony of a confidential informant. Nonetheless, applicant urged that these claims be reconsidered, as the press of time during the first set of collateral proceedings had denied his counsel a "full and fair opportunity" to develop the claims in the state and federal courts.

Applicant's second habeas petition also contained several claims that purportedly had not been raised in his first federal habeas petition: (i) that the State violated *Brady* and *Agurs* by failing to disclose prior to trial that the chief prosecution witness had counsel whose fees were paid by the State, despite trial counsel's discovery demand for "any material or information" relevant to the "credibility of the State's witnesses"; (ii) that the "appearance of justice" was denied by the Florida Supreme Court's consideration of applicant's extra-record materials in deciding applicant's direct appeal; (iii) that the statute under which applicant was sentenced unconstitutionally excluded nonstatutory mitigating factors from consideration, see *Lockett* v. *Ohio*, *supra*. These claims twice previously had been considered, as noted above, by the Florida Supreme Court.

After a hearing on January 23, the District Court denied a stay of execution, the petition for habeas corpus, and a certificate of probable cause. The court concluded that the "ends of justice" would not be served by reconsideration of the claims that had been raised on the first petition for habeas corpus. Further, the court expressed doubt that the claims that applicant described as "new" had not been substantially considered during the first federal habeas proceeding. It concluded, in any event, that applicant's presentation of these claims on the present petition, insofar as they were new, constituted an abuse of the writ, see 28 U. S. C. § 2254 Rule 9(b), as applicant showed "inexcusable neglect" in not having raised these claims on the first petition.

On appeal, the Court of Appeals concluded in a *per curiam* opinion that the District Court was "correct" in dismissing applicant's petition on the grounds that it presented successive claims and constituted an abuse of the writ. The Court of Appeals therefore denied a certificate of probable cause and a stay of execution pending an appeal on the merits of the habeas petition to that court. The Court of Appeals, however, granted a temporary stay until January 25, at 12 noon, to afford applicant an opportunity to apply to this Court for a stay of execution.

Applicant then submitted to the Court of Appeals a petition for rehearing, a suggestion for rehearing en banc, and an application for a stay pending rehearing. Applicant contended that the insufficient time allowed to his counsel to prepare the first habeas corpus petition violated applicant's right to effective assistance in capital postconviction proceedings; that the inadequacy of counsel's preparation in any event should be relevant to the question whether presentation of new claims constituted abuse of the writ; and that the District Court should have held an evidentiary hearing to inquire into the circumstances under which the first habeas petition was prepared. The Court of Appeals denied the petition for rehearing, the suggestion for rehearing en banc, and the application for stay, with none of the participating judges requesting a vote on the suggestion. Applicant then filed with this Court a petition for writ of certiorari and an application for stay pending consideration of the petition.

III

Applicant's petition for writ of certiorari repeats the claims that were presented to the Court of Appeals in applicant's petition for rehearing and suggestion for rehearing en banc. Applicant urges that the lower courts should reconsider, after an evidentiary hearing and in light of the haste with which applicant's first habeas petition was prepared, their findings as to applicant's abuse of the writ.[3] Like the Court of Appeals, we conclude that these findings do not warrant further review.

With respect to the grounds for relief that applicant presented to the District Court for the first time on his second habeas petition, we uphold the finding of the District Court and the Court of Appeals that presentation of these claims constitutes an abuse of the writ. As applicant had presented each of these claims to the state courts before the first petition for habeas was filed (and, indeed, the substance of these claims may have been presented in the first habeas petition), applicant hardly can contend that these claims were unknown to him at that time.[4]

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[3] Applicant suggests that this haste denied him his right to counsel in postconviction proceedings and refers us in particular to *Ross* v. *Moffitt*, 417 U. S. 600 (1974), and *Powell* v. *Alabama*, 287 U. S. 45 (1932). *Ross* v. *Moffitt* held that the State has no obligation to provide counsel for discretionary direct review of a conviction either in the state courts or in this Court. Whether there is a right to counsel in repetitive collateral proceedings in capital cases is not presented here as applicant had counsel throughout the relevant proceedings. See n. 4, *infra*. We agree with the courts below that the circumstances under which the first petition for habeas was considered do not require those courts to consider further the claims withheld from those petitions.

Nor has applicant shown any basis for disagreeing with the finding of the District Court and the Court of Appeals that the ends of justice would not be served by reconsideration of those claims previously presented on federal habeas. The federal and state courts carefully and repetitively have reviewed applicant's challenges to his conviction and sentence.

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[4] Applicant contends nonetheless that he could not have been expected to present these claims in his first federal habeas petition, as his present counsel was appointed when execution was imminent and therefore did not have time fully to familiarize himself with the case. This contention is not new, has been rejected by the courts below, and is meritless. The following sequence, however, is of interest: Applicant's conviction became final upon affirmance by the Florida Supreme Court on March 27, 1980, and this Court denied a petition for writ of certiorari to review the conviction on October 14, 1980. Applicant offers no explanation as to why he allowed almost two years to elapse between the affirmance of his conviction and the filing of his first motion for postconviction relief in the state courts on January 15, 1982. Nor does applicant contend that he was denied counsel during that period. In fact, it appears that applicant continued to be represented throughout this period by his trial counsel. That counsel filed a motion to mitigate sentence that was acted upon on January 29, 1981, was listed as applicant's counsel in the petition for writ of certiorari in *Brown* v. *Wainwright*, 392 So. 2d 1327 (1981) (filed on April 3, 1981), and represented applicant on his first postconviction motion and the notice of appeal from denial of that motion in January 1982.

Finally, the lower courts' consideration of the first federal habeas petition, in which applicant was represented by his present counsel, was not conducted under the pressure of imminent execution, as the Court of Appeals had stayed execution pending consideration of applicant's first habeas petition.

Upon consideration of the extensive papers filed with the Court, we find that none of these challenges warrants further review. Indeed, the grounds relied upon by applicant all appear to be meritless.

For these reasons, we deny the petition for writ of certiorari and deny the application for a stay.

It is so ordered.

JUSTICE STEVENS, concurring.

In my opinion, the claims presented to the District Court, to the Court of Appeals, and to this Court, by means of the second petition for a federal writ of habeas corpus, are essentially the same as claims that had previously been presented in the first petition. While I join the Court's disposition of the application and petition, I rely largely on the fact that the essence of each of petitioner's current claims was raised in an earlier federal habeas corpus proceeding. *Antone* v. *Strickland,* 706 F. 2d 1534 (CA11), cert. denied, 464 U. S. 1003 (1983). Nothing alleged in this application persuades me that this Court should exercise its discretion to permit petitioner to relitigate these claims. I therefore find it unnecessary to consider the merits of petitioner's arguments concerning hypothetical claims that were raised in the second petition but not in the first.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia,* 428 U.S. 153, 227, 231 (1976), we would grant the application for a stay of execution, grant the petition for certiorari, and vacate the death sentence.

UNITED BUILDING & CONSTRUCTION TRADES COUNCIL OF CAMDEN COUNTY AND VICINITY *v.* MAYOR AND COUNCIL OF THE CITY OF CAMDEN ET AL.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY

No. 81–2110. Argued November 28, 1983—Decided February 21, 1984

Acting pursuant to a statewide affirmative-action program, the city of Camden, N. J., adopted an ordinance requiring that at least 40% of the employees of contractors and subcontractors working on city construction projects be Camden residents. After the ordinance was approved by the New Jersey Treasury Department, appellant, an association of labor organizations representing private employees in the building and construction trades, filed an appeal with the Appellate Division of the New Jersey Superior Court challenging the Treasury Department's approval of the ordinance. The New Jersey Supreme Court certified the appeal directly to that court and rejected appellant's challenges to the ordinance's validity, including the claim that the ordinance violated the Privileges and Immunities Clause of Art. IV of the Federal Constitution. The court held that the Clause did not apply because the ordinance discriminated on the basis of *municipal*, not state, residency and had identical effects upon out-of-state citizens and New Jersey citizens not residing in Camden.

Held:

1. The ordinance is properly subject to the strictures of the Privileges and Immunities Clause. Pp. 214–218.

(a) That the ordinance is a municipal, rather than a state, law does not place it outside the Clause's scope. Here, municipal action cannot be distinguished easily from state action, since the ordinance would not have gone into effect without the Treasury Department's approval. Moreover, a municipality is merely a political subdivision of the State, and what would be unconstitutional if done directly by the State can no more readily be accomplished by a city deriving its authority from the State. Pp. 214–215.

(b) The Clause applies not only to laws that discriminate on the basis of state citizenship, but also to laws that discriminate on the basis of municipal residency. For purposes of analysis of most cases under the Clause, the terms "citizen" and "resident" are essentially interchangeable. Camden's ordinance is not immune from constitutional review at the behest of out-of-state residents merely because in-state residents who do not live in Camden are similarly disadvantaged. While such in-state residents have no claim under the Clause, nevertheless they at least have a chance to remedy at the polls the discrimination against them. Pp. 215–218.

2. On remand, the determination of whether the Camden ordinance violates the Privileges and Immunities Clause should be made under the appropriate constitutional standard, which requires determination of whether the ordinance burdens one of those privileges and immunities protected by the Clause, and, if so, whether there is a "substantial reason" for the discrimination against citizens of other States. Pp. 218–223.

(a) Although Camden may, without fear of violating the Commerce Clause, pressure private employers engaged in public works projects funded in whole or in part by the city to hire city residents, cf. *White* v. *Massachusetts Council of Construction Employers, Inc.*, 460 U. S. 204, an out-of-state resident's interest in employment by private employers on public works projects in another State is sufficiently fundamental to the promotion of interstate harmony and sufficiently basic to the livelihood of the Nation as to fall within the purview of the Privileges and Immunities Clause. Pp. 218–222.

(b) However, it is impossible on the record as it now stands to evaluate Camden's contention that its ordinance is carefully tailored to counteract grave economic and social ills involving unemployment of city residents and a sharp decline in the city's population. On remand, the New Jersey Supreme Court may decide, consistent with state procedures, on the best method for making the necessary findings of fact. Pp. 222–223.

88 N. J. 317, 443 A. 2d 148, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, POWELL, STEVENS, and O'CONNOR, JJ., joined. BLACKMUN, J., filed a dissenting opinion, *post*, p. 223.

Steven K. Kudatzky argued the cause and filed briefs for appellant.

N. Thomas Foster argued the cause for appellees. With him on the brief for appellees Mayor and Council of the City of Camden was *Lawrence R. Velvel*. *Irwin I. Kimmelman*, Attorney General of New Jersey, *James J. Ciancia*, Assistant Attorney General, and *Joseph L. Yannotti*, Deputy

Attorney General, filed a brief for appellee Department of Treasury of the State of New Jersey.*

JUSTICE REHNQUIST delivered the opinion of the Court.

A municipal ordinance of the city of Camden, New Jersey, requires that at least 40% of the employees of contractors and subcontractors working on city construction projects be Camden residents. Appellant, the United Building and Construction Trades Council of Camden County and Vicinity (Council), challenges that ordinance as a violation of the Privileges and Immunities Clause, Art. IV, § 2, cl. 1, of the United States Constitution.[1] The Supreme Court of New Jersey rejected appellant's privileges and immunities attack on the ground that the ordinance discriminates on the basis of *municipal*, not state, residency. The court "decline[d] to apply the Privileges and Immunities Clause in the context of a municipal ordinance that has identical effects upon out-of-state citizens and New Jersey citizens not residing in the locality." 88 N. J. 317, 342, 443 A. 2d 148, 160 (1982). We conclude that the challenged ordinance is properly subject to the strictures of the Clause. We therefore reverse the judgment of the Supreme Court of New Jersey and remand the case for a determination of the validity of the ordinance under the appropriate constitutional standard.

On August 28, 1980, the Camden City Council, acting pursuant to a statewide affirmative-action program,[2] adopted an

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*_Wayne S. Henderson_ filed a brief for the New England Legal Foundation as *amicus curiae* urging reversal.

Joseph H. Rodriguez and *Michael L. Perlin* filed a brief for the New Jersey Department of the Public Advocate as *amicus curiae* urging affirmance.

[1] "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

[2] The New Jersey Law Against Discrimination establishes a comprehensive affirmative-action program in the awarding of public works contracts. N. J. Stat. Ann. §§ 10:5-31 to 10:5-38 (West 1976). Any contractor, subcontractor, or firm seeking such contracts must guarantee compliance with an affirmative-action program approved by the State Treasurer. The

ordinance setting minority hiring "goals" on all public works contracts. Ordinance MC 1650, App. to Juris. Statement A36. The ordinance also created a hiring preference for Camden residents, with a separate 1-year residency requirement triggering eligibility for that preference. Ordinance MC 1650 § I(5), App. to Juris. Statement A38. As subsequently amended, the ordinance requires that on all construction projects funded by the city:[3]

> "The developer/contractor, in hiring for jobs, shall make every effort to employ persons residing within the City of Camden but, in no event, shall less than forty percent (40%) of the entire labor force be residents of the City of Camden." Ordinance MC 1653 § C(IV)(b), App. to Juris. Statement A56.

Treasurer is empowered to promulgate specific affirmative-action requirements based on "the percentage of population of minority groups in the State or areas thereof." § 10:5–36(a). Alternatively, the law permits municipal and state agencies to adopt and administer their own affirmative-action plans. § 10:5–36(c). Such plans must be submitted to the State Treasurer to ensure that each plan conforms to the statutory and administrative requirements, and "establishes an employment goal which is not lower than the applicable goal established by" the Treasurer. N. J. Admin. Code 17:27–6.5 (1982).

[3] The specific scope of the ordinance was stated as follows:

"Wherever the City of Camden spends funds derived from any public source for construction contracts or where the City of Camden confers a direct financial benefit upon a party, but excluding the grant of a property tax abatement, the fair market value of which exceeds $50,000.00, the provisions of this ordinance shall apply . . . . The provisions of this ordinance shall also apply to the development and construction of all residential housing of four (4) units or less." Ordinance MC 1650 § II, App. to Juris. Statement A38–A39.

Appellant argued initially that the final sentence of this section extended the reach of the city's ordinance to purely private construction in which municipal funds were not involved. Appellees claimed that the ordinance was never so interpreted and has only been applied to projects funded in whole or in part by city funds or funds administered by the city. In light of subsequent amendments, see *infra*, at 213–214, the scope of the ordinance is no longer in issue.

The contractor is also obliged to ensure that any subcontractors working on such projects adhere to the same requirement. Ordinance MC 1650 § VIII, App. to Juris. Statement A46.

The amended ordinance was submitted for approval to the Chief Affirmative Action Officer of the New Jersey Treasury Department in November 1980. Following brief administrative proceedings, the ordinance was designated as a state-approved affirmative-action construction program. Appellant, an association of labor organizations representing private employees in the building and construction trades in various New Jersey counties,[4] filed a notice of appeal with the Appellate Division of the New Jersey Superior Court challenging the final determination of the Treasury Department in approving the Camden plan. The New Jersey Supreme Court certified the appeal directly to that court to decide all the issues in the case.

Appellant challenged state approval of the resident-hiring quota as ultra vires, and as unconstitutional under the Commerce Clause and the Privileges and Immunities Clause of Art. IV of the United States Constitution and under the Fourteenth Amendment's Equal Protection Clause.[5] The New Jersey court sustained the Treasurer's action as consistent both with state law and the Federal Constitution. Citing *Reeves, Inc.* v. *Stake,* 447 U. S. 429 (1980), and *Hughes* v. *Alexandria Scrap Corp.,* 426 U. S. 794 (1976), the court held that the resident quota was not subject to challenge under the Commerce Clause because the State was acting as a market participant rather than as a market regulator. 88

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[4] The Council has at least some members who reside outside New Jersey.

[5] The Council also challenged approval of the minority hiring goals as ultra vires the State Treasurer's authority and as a violation of equal protection. The New Jersey court rejected both arguments, finding approval of the goal within the clear scope of the State Treasurer's delegated authority and the goal itself constitutional under *Fullilove* v. *Klutznick,* 448 U. S. 448 (1980). 88 N. J., 317, 326–328, 330–337, 443 A. 2d 148, 152–153, 154–158 (1982). The Council has not appealed from that ruling.

N. J., at 338–341, 443 A. 2d, at 158–160. The court also held that the quota did not violate the Privileges and Immunities Clause because it was not aimed primarily at out-of-state residents. "It almost certainly affects more New Jersey residents not living in Camden than it does out-of-state residents. Because the Camden ordinance does not affect 'the States['] . . . treatment of each other's residents,' . . . it does not violate any privilege of state citizenship." *Id.*, at 341–342, 443 A. 2d, at 160. Finally, the New Jersey Supreme Court held that the 1-year residency requirement did not violate the right to travel protected by the Equal Protection Clause, concluding that only a rational basis is required to uphold a residency requirement for city employment. *Id.*, at 342–343, 443 A. 2d, at 160–161.

Appellant then filed this appeal raising the same three constitutional challenges to the resident-hiring quota. We noted probable jurisdiction. 460 U. S. 1021 (1983). Since the Council filed its appeal, however, there have been two significant changes in the posture of the case. First, the Court decided *White* v. *Massachusetts Council of Construction Employers, Inc.*, 460 U. S. 204 (1983), which held that an executive order of the Mayor of Boston, requiring that at least 50% of all jobs on construction projects funded in whole or in part by city funds be filled by bona fide city residents, was immune from scrutiny under the Commerce Clause because Boston was acting as a market participant rather than as a market regulator. In light of the decision in *White*, appellant has abandoned its Commerce Clause challenge to the Camden ordinance.

Second, in July 1983 Camden amended its affirmative-action plan. The 1-year residency requirement was deleted, thereby mooting appellant's equal protection challenge based on that durational requirement. Now, a resident of the city of Camden is defined simply as "any person who resides in the City of Camden." App. to Brief for Appellees Mayor and Council of the City of Camden A–5. Also, the scope of the ordinance was clarified.[6] It now applies to any construction project "which is funded in whole or in part with City funds or funds which the City expends or administers in accordance with the terms of a grant." *Id.*, at A–4. Finally, the 40% resident-hiring requirement was changed from a strict "quota" to a "goal" with which developers and contractors must make "every good faith effort" to comply. *Id.*, at A–13.

Because of these changes, the only question left for our consideration is whether the Camden ordinance, as now written, violates the Privileges and Immunities Clause.[7] We first address the argument, accepted by the Supreme Court of New Jersey, that the Clause does not even apply to a *municipal* ordinance such as this. Two separate contentions are advanced in support of this position: first, that the Clause only applies to laws passed by a *State* and, second, that the Clause only applies to laws that discriminate on the basis of *state* citizenship.

The first argument can be quickly rejected. The fact that the ordinance in question is a municipal, rather than a state, law does not somehow place it outside the scope of the Privileges and Immunities Clause. First of all, one cannot easily distinguish municipal from state action in this case: the municipal ordinance would not have gone into effect without express approval by the State Treasurer. As the New Jersey Supreme Court noted in discussing the constitutionality of the minority hiring goals:

> "By approving the Camden plan, the State Treasurer has established a minority hiring goal for the City of Camden that operates no differently than every other minority hiring goal established by the State Treas-

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[6] See n. 3, *supra*.

[7] In *White* v. *Massachusetts Council of Construction Employers, Inc.*, 460 U. S. 204, 214–215, n. 12 (1983), we specifically declined to pass on the merits of a privileges and immunities challenge to the Mayor's executive order because the court below did not reach the issue.

> urer. . . . The Council's constitutional challenge to the Camden minority hiring goal must therefore be interpreted as a challenge to the State Treasurer's general power to issue affirmative action hiring goals." 88 N. J., at 330, 443 A. 2d, at 154.

The constitutional challenge to the resident hiring preference, therefore, must also "be interpreted as a challenge to the State Treasurer's general power" to adopt such a preference.[8] The New Jersey court specifically found that the State Treasurer's approval of the resident-hiring preference was "not *ultra vires* or an abuse of discretion." *Id.*, at 329, 443 A. 2d, at 154.

More fundamentally, a municipality is merely a political subdivision of the State from which its authority derives. *Trenton* v. *New Jersey*, 262 U. S. 182, 187 (1923). It is as true of the Privileges and Immunities Clause as of the Equal Protection Clause that what would be unconstitutional if done directly by the State can no more readily be accomplished by a city deriving its authority from the State. *Memorial Hospital* v. *Maricopa County*, 415 U. S. 250, 256 (1974); *Avery* v. *Midland County*, 390 U. S. 474, 480–481 (1968). Thus, even if the ordinance had been adopted solely by Camden, and not pursuant to a state program or with state approval, the hiring preference would still have to comport with the Privileges and Immunities Clause.

The second argument merits more consideration. The New Jersey Supreme Court concluded that the Privileges and Immunities Clause does not apply to an ordinance that discriminates solely on the basis of *municipal* residency. The Clause is phrased in terms of *state* citizenship and was designed "to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." *Paul* v. *Virginia*, 8 Wall. 168, 180 (1869). See also *Hicklin* v. *Orbeck*, 437 U. S. 518, 523–524 (1978); *Ward* v. *Maryland*, 12 Wall. 418, 430 (1871).

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[8] As noted by the Supreme Court of New Jersey, this case was brought as a challenge to the State's administrative approval of the Camden ordinance, and not as a direct challenge to Camden's adoption of it. 88 N. J., at 324, 443 A. 2d, at 151.

> "The primary purpose of this clause, like the clauses between which it is located—those relating to full faith and credit and to interstate extradition of fugitives from justice—was to help fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy. For protection of such equality the citizen of State A was not to be restricted to the uncertain remedies afforded by diplomatic processes and official retaliation." *Toomer* v. *Witsell*, 334 U. S. 385, 395 (1948) (footnote omitted).

Municipal residency classifications, it is argued, simply do not give rise to the same concerns.

We cannot accept this argument. We have never read the Clause so literally as to apply it only to distinctions based on state citizenship. For example, in *Mullaney* v. *Anderson*, 342 U. S. 415, 419–420 (1952), the Court held that the Alaska Territory had no more freedom to discriminate against those not residing in the Territory than did any State to favor its own citizens. And despite some initial uncertainty, compare *Travis* v. *Yale & Towne Mfg. Co.*, 252 U. S. 60, 78–79 (1920), and *Blake* v. *McClung*, 172 U. S. 239, 246–247 (1898), with *Douglas* v. *New York, N. H. & H. R. Co.*, 279 U. S. 377, 386–387 (1929), and *La Tourette* v. *McMaster*, 248 U. S. 465, 469–470 (1919), it is now established that the terms "citizen" and "resident" are "essentially interchangeable," *Austin* v. *New Hampshire*, 420 U. S. 656, 662, n. 8 (1975), for purposes of analysis of most cases under the Privileges and Immunities Clause. See *Hicklin* v. *Orbeck*, *supra*, at 524, n. 8; *Toomer* v. *Witsell*, *supra*, at 397. A person who is not residing in a given State is *ipso facto* not residing in a city within that

State. Thus, whether the exercise of a privilege is conditioned on state residency or on municipal residency he will just as surely be excluded.

Given the Camden ordinance, an out-of-state citizen who ventures into New Jersey will not enjoy the same privileges as the New Jersey citizen residing in Camden. It is true that New Jersey citizens not residing in Camden will be affected by the ordinance as well as out-of-state citizens. And it is true that the disadvantaged New Jersey residents have no claim under the Privileges and Immunities Clause. *Slaughter-House Cases*, 16 Wall. 36, 77 (1873). But New Jersey residents at least have a chance to remedy at the polls any discrimination against them. Out-of-state citizens have no similar opportunity, *Austin* v. *New Hampshire*, *supra*, at 662, and they must not "be restricted to the uncertain remedies afforded by diplomatic processes and official retaliation." *Toomer* v. *Witsell*, *supra*, at 395.[9] We conclude that Cam-

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[9] The dissent suggests that New Jersey citizens not residing in Camden will adequately protect the interests of out-of-state residents and that the scope of the Privileges and Immunities Clause should be measured in light of this political reality. See, *post*, at 231–232; *post*, at 227 ("the Framers had every reason to believe that intrastate discrimination based on municipal residence could and would be dealt with by the States themselves in those instances where it persisted"). What the dissent fails to appreciate is that the Camden ordinance at issue in this case was adopted pursuant to a comprehensive, statewide program applicable in all New Jersey cities. See n. 2, *supra*. The Camden resident-preference ordinance has already received state sanction and approval, see *supra*, at 212, and every New Jersey city is free to adopt a similar protectionist measure. Some have already done so. See Reply Brief for Appellant 41–42, n. 30, and App. A. Thus, it is hard to see how New Jersey residents living outside Camden will protect the interests of out-of-state citizens.

More fundamentally, the dissent's proposed blanket exemption for all classifications that are less than statewide would provide States with a simple means for evading the strictures of the Privileges and Immunities Clause. Suppose, for example, that California wanted to guarantee that all employees of contractors and subcontractors working on construction projects funded in whole or in part by state funds are state residents. Under the dissent's analysis, the California Legislature need merely divide den's ordinance is not immune from constitutional review at the behest of out-of-state residents merely because some in-state residents are similarly disadvantaged. Cf. *Zobel* v. *Williams*, 457 U. S. 55, 75 (1982) (O'CONNOR, J., concurring in judgment).

Application of the Privileges and Immunities Clause to a particular instance of discrimination against out-of-state residents entails a two-step inquiry. As an initial matter, the Court must decide whether the ordinance burdens one of those privileges and immunities protected by the Clause. *Baldwin* v. *Montana Fish and Game Comm'n*, 436 U. S. 371, 383 (1978). Not all forms of discrimination against citizens of other States are constitutionally suspect.

> "Some distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual States, and are permitted; other distinctions are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States. Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally." *Ibid.*

As a threshold matter, then, we must determine whether an out-of-state resident's interest in employment on public works contracts in another State is sufficiently "fundamental" to the promotion of interstate harmony so as to "fall within the purview of the Privileges and Immunities Clause." *Id.*, at 388. See also *Canadian Northern R. Co.* v. *Eggen*,

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the State in half, providing one resident-hiring preference for northern Californians on all such projects taking place in northern California, and one for southern Californians on all projects taking place in southern California. State residents generally would benefit from the law at the expense of out-of-state residents; yet, the law would be immune from scrutiny under the Clause simply because it was not phrased in terms of *state* citizenship or residency. Such a formalistic construction would effectively write the Clause out of the Constitution.

252 U. S. 553, 560 (1920); *Blake* v. *McClung*, 172 U. S., at 248.

Certainly, the pursuit of a common calling is one of the most fundamental of those privileges protected by the Clause. *Baldwin* v. *Montana Fish and Game Comm'n*, *supra*, at 387. Many, if not most, of our cases expounding the Privileges and Immunities Clause have dealt with this basic and essential activity. See, *e. g.*, *Hicklin* v. *Orbeck*, 437 U. S. 518 (1978); *Austin* v. *New Hampshire*, 420 U. S. 656 (1975); *Mullaney* v. *Anderson*, 342 U. S. 415 (1952); *Toomer* v. *Witsell*, 334 U. S. 385 (1948); *Ward* v. *Maryland*, 12 Wall. 418 (1871). Public employment, however, is qualitatively different from employment in the private sector; it is a subspecies of the broader opportunity to pursue a common calling. We have held that there is no fundamental right to government employment for purposes of the Equal Protection Clause. *Massachusetts Bd. of Retirement* v. *Murgia*, 427 U. S. 307, 313 (1976) *(per curiam)*. Cf. *McCarthy* v. *Philadelphia Civil Service Comm'n*, 424 U. S. 645 (1976) *(per curiam)* (rejecting equal protection challenge to municipal residency requirement for municipal workers). And in *White*, 460 U. S., at 211, n. 7, we held that for purposes of the Commerce Clause everyone employed on a city public works project is, "in a substantial if informal sense, 'working for the city.'"

It can certainly be argued that for purposes of the Privileges and Immunities Clause everyone affected by the Camden ordinance is also "working for the city" and, therefore, has no grounds for complaint when the city favors its own residents. But we decline to transfer mechanically into this context an analysis fashioned to fit the Commerce Clause. Our decision in *White* turned on a distinction between the city acting as a market participant and the city acting as a market regulator. The question whether employees of contractors and subcontractors on public works projects were or were not, in some sense, working for the city was crucial to that analysis. The question had to be answered in order to chart the boundaries of the distinction. But the distinction between market participant and market regulator relied upon in *White* to dispose of the Commerce Clause challenge is not dispositive in this context. The two Clauses have different aims and set different standards for state conduct.

The Commerce Clause acts as an implied restraint upon state regulatory powers. Such powers must give way before the superior authority of Congress to legislate on (or leave unregulated) matters involving interstate commerce. When the State acts solely as a market participant, no conflict between state *regulation* and federal regulatory authority can arise. *White*, *supra*, at 206–208; *Reeves, Inc.* v. *Stake*, 447 U. S., at 436–437; *Hughes* v. *Alexandria Scrap Corp.*, 426 U. S., at 810. The Privileges and Immunities Clause, on the other hand, imposes a direct restraint on state action in the interests of interstate harmony. *Hicklin* v. *Orbeck*, *supra*, at 523–524; *Ward* v. *Maryland*, *supra*, at 430; *Paul* v. *Virginia*, 8 Wall., at 180. This concern with comity cuts across the market regulator-market participant distinction that is crucial under the Commerce Clause. It is discrimination against out-of-state residents on matters of fundamental concern which triggers the Clause, not regulation affecting interstate commerce. Thus, the fact that Camden is merely setting conditions on its expenditures for goods and services in the marketplace does not preclude the possibility that those conditions violate the Privileges and Immunities Clause.

In *Hicklin* v. *Orbeck*, *supra*, we struck down as a violation of the Privileges and Immunities Clause an "Alaska Hire" statute containing a resident-hiring preference for all employment related to the development of the State's oil and gas resources.[10] Alaska argued in that case that "because the oil and gas that are the subject of Alaska Hire are *owned* by the State, this ownership, of itself, is sufficient justification for the Act's discrimination against nonresidents, and takes the Act totally without the scope of the Privileges and Immunities Clause." *Id.*, at 528 (footnote omitted). We concluded, however, that the State's interest in controlling those things it claims to own is not absolute. "Rather than placing a statute completely beyond the Clause, a State's ownership of the property with which the statute is concerned is a factor—although often the crucial factor—to be considered in evaluating whether the statute's discrimination against noncitizens violates the Clause." *Id.*, at 529. See also *Baldwin* v. *Montana Fish and Game Comm'n*, 436 U. S., at 385. Much the same analysis, we think, is appropriate to a city's efforts to bias private employment decisions in favor of its residents on construction projects funded with public moneys. The fact that Camden is expending its own funds or funds it administers in accordance with the terms of a grant is certainly a factor—perhaps the crucial factor—to be considered in evaluating whether the statute's discrimination violates the Privileges and Immunities Clause. But it does not remove the Camden ordinance completely from the purview of the Clause.

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[10] Under the dissent's formalistic approach, see n. 9, *supra*, the "Alaska Hire" statute in *Hicklin* would have been exempt from any challenge under the Privileges and Immunities Clause if the Alaska Legislature had simply excluded from the hiring preference the residents of one remote county. Yet the discriminatory effect on out-of-state residents, with which, after all, the Clause is concerned, would have been the same.

In sum, Camden may, without fear of violating the Commerce Clause, pressure private employers engaged in public works projects funded in whole or in part by the city to hire city residents. But that same exercise of power to bias the employment decisions of private contractors and subcontractors against out-of-state residents may be called to account under the Privileges and Immunities Clause. A determination of whether a privilege is "fundamental" for purposes of that Clause does not depend on whether the employees of private contractors and subcontractors engaged in public works projects can or cannot be said to be "working for the city." The opportunity to seek employment with such private employers is "sufficiently basic to the livelihood of the Nation," *Baldwin* v. *Montana Fish and Game Comm'n*, *supra*, at 388, as to fall within the purview of the Privileges and Immunities Clause even though the contractors and subcontractors are themselves engaged in projects funded in whole or part by the city.

The conclusion that Camden's ordinance discriminates against a protected privilege does not, of course, end the inquiry. We have stressed in prior cases that "[l]ike many other constitutional provisions, the privileges and immunities clause is not an absolute." *Toomer* v. *Witsell*, 334 U. S., at 396. It does not preclude discrimination against citizens of other States where there is a "substantial reason" for the difference in treatment. "[T]he inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them." *Ibid.* As part of any justification offered for the discriminatory law, nonresidents must somehow be shown to "constitute a peculiar source of the evil at which the statute is aimed." *Id.*, at 398.

The city of Camden contends that its ordinance is necessary to counteract grave economic and social ills. Spiralling unemployment, a sharp decline in population, and a dramatic reduction in the number of businesses located in the city have eroded property values and depleted the city's tax base. The resident-hiring preference is designed, the city contends, to increase the number of employed persons living in Camden and to arrest the "middle-class flight" currently plaguing the city. The city also argues that all non-Camden residents employed on city public works projects, whether they reside in New Jersey or Pennsylvania, constitute a "source of the evil at which the statute is aimed." That is, they "live off" Camden without "living in" Camden. Camden contends that the scope of the discrimination practiced in the ordinance, with its municipal residency requirement, is carefully tailored to alleviate this evil without unreasonably harming nonresidents, who still have access to 60% of the available positions.

Every inquiry under the Privileges and Immunities Clause "must . . . be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures." *Toomer* v. *Witsell*, *supra*, at 396. This caution is particularly appropriate when a government body is merely setting conditions on the expenditure of funds it controls. See *supra*, at 221. The Alaska Hire statute at issue in *Hicklin* v. *Orbeck*, 437 U. S. 518 (1978), swept within its strictures not only contractors and subcontractors dealing directly with the State's oil and gas; it also covered suppliers who provided goods and services to those contractors and subcontractors. We invalidated the Act as "an attempt to force virtually all businesses that benefit in some way from the economic ripple effect of Alaska's decision to develop its oil and gas resources to bias their employment practices in favor of the State's residents." *Id.*, at 531. No similar "ripple effect" appears to infect the Camden ordinance. It is limited in scope to employees working directly on city public works projects.

Nonetheless, we find it impossible to evaluate Camden's justification on the record as it now stands. No trial has ever been held in the case. No findings of fact have been made. The Supreme Court of New Jersey certified the case for direct appeal after the brief administrative proceedings that led to approval of the ordinance by the State Treasurer. It would not be appropriate for this Court either to make factual determinations as an initial matter or to take judicial notice of Camden's decay. We, therefore, deem it wise to remand the case to the New Jersey Supreme Court. That court may decide, consistent with state procedures, on the best method for making the necessary findings.

The judgment of the Supreme Court of New Jersey is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN, dissenting.

For over a century the underlying meaning of the Privileges and Immunities Clause of the Constitution's Article

IV[1] has been regarded as settled: at least absent some substantial, noninvidious justification, a State may not discriminate between its own residents and residents of other States on the basis of state citizenship.[2] See generally *Hicklin* v. *Orbeck*, 437 U. S. 518, 523–526 (1978); *Toomer* v. *Witsell*, 334 U. S. 385, 395 (1948); *Hague* v. *CIO*, 307 U. S. 496, 511 (1939) (opinion of Roberts, J.); *Slaughter-House Cases*, 16 Wall. 36, 77 (1873); *Paul* v. *Virginia*, 8 Wall. 168, 180 (1869).

Today, however, the Court casually extends the scope of the Clause by holding that it applies to laws that discriminate *among* state residents on the basis of *municipal* residence, simply because discrimination on the basis of municipal residence disadvantages citizens of other States "*ipso facto.*" *Ante*, at 216–217. This novel interpretation arrives accompanied by little practical justification and no historical or textual support whatsoever. Because I believe that the Privileges and Immunities Clause was not intended to apply to the kind of municipal discrimination presented by this case, I would affirm the judgment of the Supreme Court of New Jersey.[3]

I

The historical underpinnings of the Privileges and Immunities Clause are not in serious dispute. The Clause was derived from the fourth Article of Confederation[4] and was designed to carry forward that provision's prescription of interstate comity. *Austin* v. *New Hampshire*, 420 U. S. 656, 660–661 (1975); *United States* v. *Wheeler*, 254 U. S. 281, 294 (1920); *Slaughter-House Cases*, 16 Wall., at 75. Both the text of the Clause and the historical record confirm that the Framers meant to foreclose any one State from denying citizens of other States the same "privileges and immunities" accorded its own citizens. See *Austin* v. *New Hampshire*, 420 U. S., at 660–661. James Madison complained during the Constitutional Convention of "Acts of Virga. & Maryland which give a preference to their own citizens in cases where the Citizens [of other States] are entitled to equality of privileges by the Articles of Confederation."[5] Alexander Hamilton, who deemed the Privileges and Immunities Clause "the basis of the Union," The Federalist No. 80, p. 502 (B. Wright ed. 1961), expressly linked the Clause with the concern over state parochialism that gave rise to the federal courts' diversity jurisdiction under Article III:

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[1] "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U. S. Const., Art. IV, § 2, cl. 1.

[2] As the Court points out, it has come to treat the terms "citizen" and "resident" interchangeably for purposes of Privileges and Immunities Clause analysis. *Ante*, at 216. For the sake of simplicity I shall do the same, except where the context requires a distinction to be drawn.

[3] I agree with the Court that the Camden ordinance is not insulated from scrutiny under the Privileges and Immunities Clause merely because it is a municipal ordinance rather than a state statute. *Ante*, at 214–215. See *Woodruff* v. *Parham*, 8 Wall. 123, 140 (1869) (dictum). I also agree that appellant's equal protection challenge to the ordinance's durational requirement has been mooted by the deletion of that provision in 1983. *Ante*, at 213. See *Hall* v. *Beals*, 396 U. S. 45, 48 (1969).

[4] "The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free in-

> "[I]n order to [ensure] the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial

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habitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively. . . ." Articles of Confederation, Art. 4, 1 Stat. 4.

[5] 1 M. Farrand, Records of the Federal Convention of 1787, p. 317 (1911) (footnote omitted).

> between the different States and their citizens . . . ." *Ibid.*

While the Framers thus conceived of the Privileges and Immunities Clause as an instrument for frustrating discrimination based on state citizenship, there is no evidence of any sort that they were concerned by intrastate discrimination based on municipal residence. The most obvious reason for this is also the most simple one: by the time the Constitution was enacted, such discrimination was rarely practiced and even more rarely successful.[6] Even had attempts to practice the kind of economic localism at issue here been more widespread, moreover, there is little reason to believe that the Framers would have devoted their limited institutional resources to bringing such conduct within the ambit of the Privileges and Immunities Clause. Whatever the weaknesses of the new state governments in suppressing sectional conflicts that gave rise to outright physical violence, like Shays' Rebellion in 1786–1787, the States had more than adequate powers to prevent localities from disrupting the States' internal economic affairs through discriminatory ordinances and regulations. By the time the Constitution was adopted, most state legislatures had assumed the power to grant and alter municipal charters and the power to legislate with respect to municipal affairs.[7] Even before the Revolution, the colonial legislatures had shown themselves willing and able to exercise this authority to override local protectionist ordinances. In 1746, for example, the New York Assembly dismantled a cartel of New York City lawyers by requiring the city to open its Mayor's Court to qualified lawyers from throughout the colony.[8] As a result, the Framers had every reason to believe that intrastate discrimination based on municipal residence could and would be dealt with by the States themselves in those instances where it persisted.[9]

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[6] See, *e. g.*, E. Griffith, History of American City Government: The Colonial Period 132–143 (1972 ed.). The common trend in colonial cities in the two generations before the Revolution was for pre-existing restrictions on trade and craft work by "outsiders" to lapse into desuetude under the pressures of increasing population mobility. See *id.*, at 135, 141–143.

[7] See McBain, The Legal Status of the American Colonial City, 40 Pol. Sci. Q. 177, 192–200 (1925).

In light of the historical context in which the Privileges and Immunities Clause was adopted, it hardly is surprising that none of this Court's intervening decisions has suggested that the Clause applies to discrimination on the basis of municipal residence. To the contrary, while the Court never has addressed the question directly,[10] it repeatedly has proceeded on the assumption that the "Privileges and Immunities of Citizens" to which the Clause refers are entitlements held equally by all citizens of a State. Thus, in *Paul* v. *Virginia*,

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[8] Griffith, *supra*, at 143, 341.

[9] The idea that the Framers intended the Privileges and Immunities Clause to reach discrimination based on municipal residence appears even more implausible if one assumes that the Framers literally meant to confine the Clause's protections to "Privileges and Immunities of *Citizens*." If the purpose of the Clause were simply to relieve citizens of other States "from the disabilities of alienage" and guarantee them "the advantages resulting from citizenship," *Paul* v. *Virginia*, 8 Wall. 168, 180 (1869), the Clause necessarily would not be implicated by an ordinance like Camden's; the benefits created by such an ordinance are not an incident of state citizenship, even for residents of the municipality itself.

[10] The Court had a remarkably similar New Orleans ordinance before it in *Chadwick* v. *Kelley*, 187 U. S. 540 (1903), but declined to reach the Privileges and Immunities Clause question because the party challenging the ordinance was himself a resident of New Orleans. *Id.*, at 546. See also *Gallup* v. *Schmidt*, 183 U. S. 300 (1902); *Downham* v. *Alexandria Council*, 10 Wall. 173 (1870). Few decisions by state and federal courts have considered the question. See, *e. g.*, *Ward Baking Co.* v. *Fernandina*, 29 F. 2d 789 (SD Fla. 1928); *Mount Pleasant* v. *Clutch*, 6 Iowa 546 (1858); *In re Jarvis*, 66 Kan. 329, 71 P. 576 (1903); *Fecheimer Bros. & Co.* v. *Louisville*, 84 Ky. 306, 2 S. W. 65 (1886); *State ex rel. Greenwood* v. *Nolan*, 108 Minn. 170, 122 N. W. 255 (1909); *Rothermel* v. *Meyerle*, 136 Pa. 250, 20 A. 583 (1890). Academic commentary on the question is limited. See R. Howell, The Privileges and Immunities of State Citizenship 45–47 (1918); Eule, Laying the Dormant Commerce Clause to Rest, 91 Yale L. J. 425, 449, n. 128 (1982); Meyers, The Privileges and Immunities of Citizens in the Several States, pt. 2, 1 Mich. L. Rev. 364, 383 (1903).

supra, the Court stated that the Clause safeguards the enjoyment of "those privileges and immunities which are common to the citizens [in a State] under their constitution and laws by virtue of their being citizens." 8 Wall., at 180. In *Blake* v. *McClung,* 172 U. S. 239 (1898), the Court condemned a Tennessee statute that granted a priority to resident creditors over nonresident creditors on the assumption that the State's rules governing debtor-creditor relations "will be applied by its courts in all appropriate cases between citizens of that State, without making any distinction *between them.*" *Id.,* at 254 (emphasis in original). In *Travellers' Insurance Co.* v. *Connecticut,* 185 U. S. 364 (1902), the Court rejected a Privileges and Immunities Clause challenge to a Connecticut statute that taxed nonresident stockholders at a nominally higher rate than resident stockholders, on the ground that the direct differential was roughly offset by municipal taxes paid only by residents. The Court recognized that the burden borne by nonresidents might exceed that borne by residents in a particular year, but pointed out that "a like inequality will exist between residents of different localities in the State by reason of the different rates of taxation in those localities"; the disparate burden was permissible under these circumstances because "[y]ou cannot put *one* resident against *one* non-resident stockholder and by a comparison of their different burdens determine the validity of the legislation any more than you can place a stockholder resident in one municipality over against a stockholder resident in another municipality, and by comparison of their different burdens determine the validity of the tax law in respect to resident stockholders." *Id.,* at 369 (emphasis added). In each case, the underlying assumption has been that the constitutionality *vel non* of a particular statute under the Privileges and Immunities Clause turns on whether the statute deprives nonresidents of benefits enjoyed in common by state residents by virtue of their residence *simpliciter.*

Indeed, I had understood the Court to have reaffirmed this principle only two Terms ago in *Zobel* v. *Williams,* 457 U. S.

55 (1982). In *Zobel,* the Court held that an Alaska statute which allocated state treasury refunds to state residents on the basis of the length of their residence violated the Equal Protection Clause. The Court declined, however, to hold that the statute violated the Privileges and Immunities Clause. It observed that the statute "does not simply make distinctions between native-born Alaskans and those who migrate to Alaska from other states;" instead, it "also discriminates among long-time residents and even native-born residents." 457 U. S., at 59, n. 5. As a result:

> "The statute does not involve the kind of discrimination which the Privileges and Immunities Clause of Art. IV was designed to prevent. That Clause 'was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy.' *Toomer* v. *Witsell,* 334 U. S. 385, 395 (1948). The Clause is thus not applicable to this case." *Id.,* at 60, n. 5.

I am somewhat at a loss to understand how the Court's decision today can be reconciled with its reasoning in *Zobel.*[11] The Alaska statute at issue in *Zobel* fell outside the scope of the Privileges and Immunities Clause for the elementary reason that it did not discriminate between state residents and nonresidents on the basis of state residence; rather, it discriminated *among* state residents in a way that disadvantaged nonresidents as well but did not thereby implicate the underlying concerns of the Privileges and Immunities Clause. The Camden ordinance presently before the Court occupies precisely the same position.

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[11] JUSTICE O'CONNOR, who concurred in the judgment in *Zobel,* wrote separately to express the contrary view that the Privileges and Immunities Clause applied to the Alaska statute even though the statute arguably "discriminates among classes of residents, rather than between residents and nonresidents." 457 U. S., at 75. The Court's apparent reliance on JUSTICE O'CONNOR's concurrence, see *ante,* at 217–218, and its failure to note the position of the Court in *Zobel* are one measure of the inconsistency between today's decision and *Zobel.* Even JUSTICE O'CONNOR's reasoning, however, does not support the result the Court reaches today. For JUSTICE O'CONNOR, the critical effect of the Alaska statute was that "[e]ach group of citizens who migrated to Alaska in the past, or chooses to move there in the future, lives in the State on less favorable terms than those who arrived earlier"; a nonresident who moved to Alaska "labors under a continuous disability" because of his prior residence in another State. 457 U. S., at 75. Here, in contrast, the Camden ordinance imposes no "continuous disability" on anyone who takes up residence in the city.

The Court's decision clashes with other Privileges and Immunities Clause precedents as well. The Court recognizes, as it must, that the Privileges and Immunities Clause does not afford state residents any protection against their own State's laws. See, *e. g.*, *Bradwell* v. *Illinois*, 16 Wall. 130, 138 (1873); *Slaughter-House Cases*, 16 Wall., at 77. When this settled rule is combined with the Court's newly fashioned rule concerning municipal discrimination, however, it has the perverse effect of vesting non-New Jersey residents with constitutional privileges that are not enjoyed by most New Jersey residents themselves. This result is directly contrary to the Court's longstanding position that the Privileges and Immunities Clause does not give nonresidents "higher and greater privileges than are enjoyed by the citizens of the state itself." *Bank of Augusta* v. *Earle*, 13 Pet. 519, 586 (1839); accord, *Shaffer* v. *Carter*, 252 U. S. 37, 53 (1920); *Detroit* v. *Osborne*, 135 U. S. 492, 498 (1890). When judicial alchemy transmutes gold into lead in this fashion, it is time for the Court to reexamine its reasoning.

Finally, the Court fails to attend to the functional considerations that underlie the Privileges and Immunities Clause. The Clause has been a necessary limitation on state autonomy not simply because of the self-interest of individual States, but because state parochialism is likely to go unchecked by state political processes when those who are disadvantaged are by definition disenfranchised as well. The Clause remedies this breakdown in the representative process by requiring state residents to bear the same burdens that they choose to place on nonresidents; "by constitutionally tying the fate of outsiders to the fate of those possessing political power, the framers insured that their interests would be well looked after." J. Ely, Democracy and Distrust 83 (1980). As a practical matter, therefore, the scope of the Clause may be measured by asking whether failure to link the interests of those who are disadvantaged with the interests of those who are preferred will consign the former group to "the uncertain remedies afforded by diplomatic processes and official retaliation." *Toomer* v. *Witsell*, 334 U. S., at 395; see *Austin* v. *New Hampshire*, 420 U. S., at 662.

Contrary to the Court's tacit assumption, discrimination on the basis of municipal residence is substantially different in this regard from discrimination on the basis of state citizenship. The distinction is simple but fundamental: discrimination on the basis of municipal residence penalizes persons within the State's political community as well as those without. The Court itself points out that while New Jersey citizens who reside outside Camden are not protected by the Privileges and Immunities Clause, they may resort to the State's political processes to protect themselves. *Ante*, at 217. What the Court fails to appreciate is that this avenue of relief for New Jersey residents works to protect residents of other States as well; disadvantaged state residents who turn to the state legislature to displace ordinances like Camden's further the interests of nonresidents as well as their own.[12]

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[12] The Court suggests that reliance on the state political process is misplaced because the Camden ordinance itself "was adopted pursuant to a comprehensive statewide program applicable in all New Jersey cities" and has received "state sanction and approval." *Ante*, at 217, n. 9. The Court misrepresents the nature of both the statewide program and the "sanction and approval" given the Camden ordinance. The ordinance was enacted pursuant to a state statute designed solely to further equal opportunity and affirmative action in New Jersey public works contracting; the New Jersey Supreme Court itself accepted appellees' argument that the state statute "does not contemplate any residency requirement." 88 N. J. 317, 328, 443 A. 2d 148, 153 (1982). In turn, the ordinance was approved by a state agency whose sole mandate was to ensure that the ordinance was not in-

Nor is this mechanism for relief merely a theoretical one; in the past decade several States, including California and Georgia, have repealed or forbidden protectionist ordinances like the one at issue here.[13] In short, discrimination on the basis of municipal residence simply does not consign residents of other States, in the words of *Toomer*, *supra*, to "the uncertain remedies afforded by diplomatic processes and official retaliation." The Court thus has applied the Privileges and Immunities Clause without regard for the political ills that it was designed to cure.[14]

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consistent with the minimum affirmative-action requirements of the state statute. *Id.*, at 329, 443 A. 2d, at 154. The municipal residency requirement thus has neither been embraced by the state legislature nor approved by any state agency with the authority to reject the ordinance on the basis of the residency requirement alone. Under these circumstances, the Court's observation reduces to the pedestrian point that the Camden ordinance has been adopted by the city and has yet to be displaced by the state legislature. That fact says nothing at all about the likelihood that the ordinance will be repealed in the future, of course, particularly should it develop on remand that interested parties like appellant ultimately must seek political rather than judicial vindication.

[13] See Eisinger, Municipal Residency Requirements and the Local Economy, 64 Soc. Sci. Q. 85, 87 (1983); Note, The Constitutionality of Residency Requirements for Municipal Employees, 24 Emory L. J. 446, 448, n. 7 (1975); Note, Municipal Employee Residency Requirements and Equal Protection, 84 Yale L. J. 1684, n. 3 (1975).

[14] Rather than respond directly to these considerations, the Court finds it easier to take issue with what it characterizes as "the dissent's proposed blanket exemption" from the Privileges and Immunities Clause "for all classifications that are less than statewide." *Ante*, at 217, n. 9. The Court's refusal to accept such an exemption is understandable; what is curious is why the Court attributes the exemption to this dissent. As I indicate below, I am no less prepared than the Court has been in the past to apply the Privileges and Immunities Clause when the classification at issue is practically equivalent to those explicitly identified by the Clause. If the Alaska Legislature were to try to rehabilitate the "Alaska Hire" statute invalidated in *Hicklin* v. *Orbeck*, 437 U. S. 518 (1978), by excluding "the residents of one remote county" from the hiring preference, *ante*, at 220, n. 10, for example, the classification would come within the ambit of the Clause because it would bear the same sort of practical relationship to a classification based on state citizenship as do classifications based on state

It still might be possible to redeem the Court's decision if it were compelled by the language of the Privileges and Immunities Clause. The Court itself, however, concedes that its interpretation of the Clause does not attach readily to a constitutional provision phrased solely in terms of state citizenship. *Ante*, at 216. The Court seeks to defend its excursion beyond the frontiers of the constitutional language on the ground that it never has read the Privileges and Immunities Clause literally to apply only to classifications based on state citizenship. *Ibid.* The examples it cites, however, are hardly compelling support. *Mullaney* v. *Anderson*, 342 U. S. 415 (1952), held not that the Privileges and Immunities Clause applies *ex proprio vigore* to discrimination by a territorial legislature based on territorial residence, but rather that Congress had made the Privileges and Immunities Clause applicable to the Territory of Alaska by statute. See 342 U. S., at 419–420.[15] See also *Haavik* v. *Alaska Packers*

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residence. The Court fails to explain why a classification that benefits all state residents *other* than the residents of a single locality stands in the same position, in terms of the practical considerations underlying the Clause, as a classification that benefits *only* the residents of one locality.

The Court raises the alternative prospect that a State might evade the Privileges and Immunities Clause by dividing itself in half and granting the residents in each half of the State employment preferences over residents in the other half of the State. *Ante*, at 217–218, n. 9. The Clause exists to protect against those classifications that a State's political process cannot be relied on to prevent, however, not those that it can, and there is no reason to believe that state residents will be willing to forgo access to employment in one half of a State merely to obtain privileged access to jobs in the other half. The fact that no State has attempted anything resembling the Court's proposed maneuver in the two centuries since the adoption of the Clause, despite the fact that none of this Court's precedents has foreclosed the option, strongly suggests that state political processes can be trusted to prevent this kind of Balkanization. The Court cannot justify deforming the Constitution's response to real problems by invoking imaginary and unrealistic ones.

[15] "Section 3 [of the Organic Act of Alaska] provides 'The Constitution of the United States . . . shall have the same force and effect within the said Territory as elsewhere in the United States.' 37 Stat. 512, 48 U. S. C. § 23. And § 9 extends the legislative power of the Territory to 'all rightful

Assn., 263 U. S. 510, 515 (1924). Even if *Mullaney* v. *Anderson* set forth the proposition for which it is cited, moreover, the practical similarity between discrimination based on territorial residence and discrimination based on state residence has no parallel here. Similarly, while the Court unquestionably has come to treat the terms "citizen" and "resident" in this area as "essentially interchangeable," *Austin* v. *New Hampshire*, 420 U. S., at 662, n. 8, it has done so not out of a general disregard for the Constitution's language, but rather because the practical relationship between residence and citizenship is close enough that discrimination on the basis of the one criterion effectively amounts to discrimination based on the other. Cf. *Travis* v. *Yale & Towne Mfg. Co.*, 252 U. S. 60, 79 (1920); Currie & Schreter, Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities, 69 Yale L. J. 1323, 1344 (1960). These decisions are not, therefore, license for the Court to set aside the language of the Privileges and Immunities Clause as an inconvenient obstacle to a preferred result. Whenever this Court has departed from the literal language of the Clause in the past, it has remained faithful to the underlying purposes of the Clause. For the reasons already set forth, I believe that the Court's decision today does not satisfy that requirement.

II

Needless to say, my view of the constitutional question in this case does not depend on my personal opinion about the desirability of the course on which Camden has embarked. I do not find "beggar thy neighbor" economic policies any more

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subjects of legislation not inconsistent with the Constitution and laws of the United States, ...' 37 Stat. 512, 514, 48 U. S. C. § 77. In the light of these sections, we cannot presume that Congress authorized the Territorial Legislature to treat citizens of States the way States cannot treat citizens of sister States. . . . [T]he Territorial Legislature, particularly in the regulation of fisheries, was granted no greater power over citizens of other States than a State legislature has." 342 U. S., at 420.

attractive when practiced by municipalities than when practiced by States or nations. The unedifying sight of localities fighting for parochial gain at one another's expense gives new urgency to Benjamin Franklin's reputed warning that "we must . . . all hang together, or most assuredly we shall all hang separately." R. Clark, Benjamin Franklin 286 (1983). At the risk of restating the obvious, however, the issue before us is not the desirability of the ordinance but its constitutionality—more particularly, its constitutionality under the Privileges and Immunities Clause.[16] Because I believe that the Clause does not apply to discrimination based on municipal residence, I dissent.

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[16] I argued without success last Term that, absent congressional authorization, ordinances like Camden's violate the dormant Commerce Clause. *White* v. *Massachusetts Council of Construction Employers, Inc.*, 460 U. S. 204, 215 (1983) (opinion concurring in part and dissenting in part). Although the Privileges and Immunities Clause and the Commerce Clause embody closely related principles of interstate relations, I agree with the Court that in certain circumstances the two Clauses "set different standards for state conduct." *Ante*, at 220. This is one such circumstance; the Commerce Clause entails a substantive policy of unimpeded interstate commerce that is impermissibly undermined by local protectionism even when intrastate commerce is penalized as well. See *Dean Milk Co.* v. *Madison*, 340 U. S. 349, 354, and n. 4 (1951).

McCAIN ET AL. *v.* LYBRAND ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

No. 82-282. Argued October 31, 1983—Decided February 21, 1984

Prior to 1966, Edgefield County, S. C., was governed by a three-member Board of County Commissioners, consisting of the County Supervisor, who was elected at-large, and two members who were appointed by the Governor. There were no residency requirements for the Commissioners. In 1966, the state legislature enacted a statute creating a new form of government for the county and altering its election practices. A three-member County Council was established, and the county was divided into three residency districts for the purpose of electing Council members. Voters throughout the county cast votes for a candidate from each district, and the candidate in each district with the most votes occupies that district's seat on the Council. The 1966 statute was not submitted to federal officials for approval as required by § 5 of the Voting Rights Act of 1965. In 1971, the 1966 statute was amended so as to increase the number of residency districts, and thus the number of Council members, from three to five, necessarily resulting in new district boundaries. This amendment was submitted to the Attorney General for his approval pursuant to § 5 of the Voting Rights Act, and, after requesting and receiving additional information (including a copy of the 1966 statute and information concerning previous candidates, election results, and residency district boundaries), the Attorney General stated that he did not object "to the change in question." Thereafter, appellants, black voters residing in the county, brought a class action in Federal District Court against appellee county officials, challenging the county's election practices on constitutional grounds. Ultimately, after protracted litigation and after appellants had filed an amended complaint alleging that the 1966 Act had never been submitted to federal officials for approval as required by § 5 of the Voting Rights Act, the District Court held that the Attorney General's request for additional information indicated that he had considered all aspects of the electoral scheme, including the changes effected in the 1966 Act, and that since the 1971 amendment retained such changes, the lack of objection to the 1971 submission necessarily constituted approval of those changes as well and rendered the failure to preclear the 1966 Act moot.

Held: The Attorney General's lack of objection to the 1971 submission cannot be deemed to have the effect of ratifying the changes embodied in the 1966 Act. Pp. 243–258.

(a) In light of the structure, purpose, history, and operation of § 5 of the Voting Rights Act, a State that seeks preclearance of changes in voting procedures pursuant to § 5 from the Attorney General, rather than a declaratory judgment from the United States District Court for the District of Columbia, must do so in an unambiguous and recordable manner. The Act does not contemplate that a "submission" occurs when the Attorney General merely becomes aware of the legislation in question. The Act's purposes would be subverted if the Attorney General could be deemed to have approved a voting change when the proposal was neither properly submitted nor in fact evaluated by him. Pp. 243–250.

(b) Here, the submission of the 1971 amendment to the Attorney General required him to determine whether either the change in the district boundaries or the change in the number of districts had a discriminatory purpose or effect, but would not appear to have required him to pass on whether the 1966 changes represented a setback for minority voters. The additional information requested and received by the Attorney General does not suggest that he approved changes that he was not requested to approve and did not enable him to ascertain whether a covered change was made by the 1966 Act, much less evaluate whether the 1966 changes were discriminatory in purpose or effect when compared to prior practices. In order to pass on the 1966 Act, the Attorney General would have needed information concerning the pre-1966 election law and its practical effects, and he neither requested nor received such information. Pp. 250–254.

(c) When a jurisdiction adopts legislation that makes clearly defined changes in its election practices, sending that legislation to the Attorney General merely with a general request for preclearance pursuant to § 5 constitutes a submission of the changes made by the enactment and cannot be deemed a submission of changes made by previous legislation that themselves were independently subject to § 5 preclearance. A request for preclearance of certain identified changes in election practices that fails to identify other practices as new ones cannot be considered an adequate submission of the latter practices. Here, the 1971 submission failed to inform the Attorney General that the provisions of the 1971 amendment which merely recodified various practices contained in the 1966 Act were themselves changes that might give rise to an inference of discrimination. To the extent there was any ambiguity in the scope of the preclearance request, the structure and purpose of the preclearance requirement plainly counsel against resolving such ambiguities in favor of the submitting jurisdiction in the circumstances of this case. Pp. 256–257.

Reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, and O'CONNOR, JJ., joined. BLACKMUN, POWELL, and REHNQUIST, JJ., concurred in the judgment.

Laughlin McDonald argued the cause for appellants. With him on the brief were *Neil Bradley*, *Christopher Coates*, *Armand Derfner*, and *Herbert E. Buhl III*.

Barbara E. Etkind argued the cause for the United States as *amicus curiae* urging reversal. On the brief were *Solicitor General Lee*, *Assistant Attorney General Reynolds*, *Deputy Solicitor General Wallace*, *Carolyn F. Corwin*, *Jessica Dunsay Silver*, and *James W. Clute*.

Karen LeCraft Henderson argued the cause for appellees. With her on the brief were *T. Travis Medlock*, Attorney General of South Carolina, *Treva G. Ashworth*, Senior Assistant Attorney General, and *Charles W. Coleman*.

JUSTICE STEVENS delivered the opinion of the Court.

In 1966, South Carolina enacted a statute that altered Edgefield County's election practices but the statute was not submitted to federal officials for their approval as required by the Voting Rights Act of 1965.[1] In 1971, the statute was amended, modifying the 1966 election practices, and state officials submitted the amendment to the Attorney General for his approval. In response to a request from the Attorney General, state officials provided him with additional documentation in support of their submission, including the 1966 statute. The Attorney General approved the submission, stating that he did not object to the change in question. The question in this case is whether the Attorney General's approval of the 1971 submission can be deemed to have the effect of ratifying the changes embodied in the 1966 enactment. We hold that the 1966 changes have not been approved.

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[1] The Voting Rights Act of 1965 requires certain States and political subdivisions to submit all changes in election practices to a three-judge panel of the United States District Court for the District of Columbia or the Attorney General of the United States. Covered jurisdictions may not implement any new election practices until the three-judge panel enters a declaratory judgment approving the changes or the Attorney General accepts the changes by either explicitly stating he does not object to them or by failing to interpose an objection within a prescribed time period. See *infra*, at 244–249.

I

As of November 1, 1964, local political authority in Edgefield County, South Carolina, was vested in a County Supervisor and a Board of County Commissioners.[2] The County Supervisor, the chairman of the three-member Board, was elected at large for a 4-year term. The County Supervisor had jurisdiction over public roads, matters relating to county taxes and expenditures, and certain other matters. The other two seats on the Board were appointed offices. These two commissioners were appointed by the Governor, also for 4-year terms, upon the recommendation of a majority of the county's delegation in the state legislature after a countywide straw vote on prospective appointees. There were no residency requirements for commissioners. The Board had limited administrative and ministerial powers.[3]

On June 1, 1966, the South Carolina General Assembly enacted Act No. 1104, which was effective as a matter of state law when it was signed by the Governor on June 7, 1966. The Act created a new form of government for Edgefield County, altering the county's election practices. The office of County Supervisor and the Board of County Commissioners were abolished upon expiration of the incumbents' terms. A three-member County Council with broad legislative and administrative powers was created,[4] and the county was divided into three residency districts for purposes of electing Council members. To qualify as a candidate for a seat on the Council under the Act, an individual must be a qualified voter in one of the three districts and is required to register as a candidate from that district. The Council members, however, are elected at large: voters throughout the county cast votes for a candidate from each district, and the candidate in each district with the largest number of votes occupies that district's seat on the Council. Council members are elected for 2-year terms, and the members themselves annually elect a chairman.

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[2] App. 142–153.

[3] See *ibid.;* see generally *Blanding* v. *Dubose,* 509 F. Supp. 1334, 1335 (SC 1981), rev'd, 454 U. S. 393 (1982).

[4] It was authorized to buy or sell property, to exercise the powers of eminent domain, to make appropriations and levy taxes, to provide necessary county services, to receive and disburse funds, to incur indebtedness, to issue bonds, to prescribe methods of accounting for accounting officers,

The 1966 Act was amended in 1971 by Act No. 521, "An Act to Amend Act No. 1104 of 1966 . . . So As To Increase The Number of Districts And The Number of County Council Members."[5] The 1971 amendment increased the number of residency districts, and thus the number of Council members, from three to five. Necessarily the change in the number of districts resulted in new district boundaries. Otherwise, the 1971 amendment did not alter the 1966 Act.

County Council elections in Edgefield County have been conducted under the basic scheme established by the 1966 Act since the first elections held pursuant to the Act in November 1966.

In 1971, state officials sent a letter to the Attorney General of the United States stating: "In accordance with the provisions of Section 5 of the Voting Rights Act of 1965, there are submitted herewith copies" of 18 listed recent state enactments, which included the 1971 amendment regarding Edge-

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and to employ county employees. The 1966 Act required the Council to employ a county administrative officer who could not be a Council member. Act No. 55 of February 23, 1967, made employment of a county administrative officer permissive rather than mandatory.

[5] Prior to the 1971 amendment, the 1966 Act had been amended in 1967 by Act No. 55 and in 1968 by Act No. 1318. App. 171–177. These earlier amendments apparently did not change any election practices and are not at issue in this case.

field County.[6] The Justice Department responded to the request for clearance of the 1971 amendment by stating: "After a preliminary examination of H2206 [the 1971 amendment], it does not appear that we have sufficient information to evaluate the change you have submitted."[7] The Justice Department therefore requested additional information from state officials—maps showing boundaries of current districts, population and registration statistics, recent election returns, "a copy of the election statute now in force"—and noted that the time limitation on consideration of the request would begin to run when the relevant information "necessary to evaluate H2206" was provided.[8] State officials forwarded the requested information "concerning the legislation that required further clarification (H2206)" to the Justice Department, including a copy of the 1966 Act.[9] The Justice Department letter in response stated that it was "concerning the submission of H2206 to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended," and then stated: "The Attorney General does not interpose any objections to the change in question."[10]

II

The appellants, black voters residing in Edgefield County, South Carolina, commenced a class action in 1974 in the United States District Court for the District of South Carolina challenging the county's election practices on constitutional grounds. Specifically, they alleged in their complaint against appellees, various county officials including the County Council members, that the county's at-large method of electing the County Council diluted the voting strength of black voters and that the county's residency districts were malapportioned. The District Court entered judgment in favor of appellants on the malapportionment claim, but that judgment was reversed on appeal. *Lytle* v. *Commissioners of Election*, 376 F. Supp. 304 (SC), rev'd, 509 F. 2d 1049, 1032 (CA4), cert. denied *sub nom. McCain* v. *Lybrand*, 419 U. S. 1032 (1974). After years of litigation and unsuccessful settlement negotiations, the District Court entered judgment in favor of appellants on their constitutional claim challenging the method of electing the Council at large from residency districts and enjoined further elections for the County Council until adoption of a new method of election, Record, Doc. Nos. 27, 28 (orders of Apr. 17, 1980, and Apr. 22, 1980). A few months later, the District Court vacated the judgment and ordered further proceedings in light of this Court's intervening decision in *City of Mobile* v. *Bolden*, 446 U. S. 55 (1980). Record, Doc. No. 31 (order of Aug. 8, 1980).

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[6] App. to Brief for United States as *Amicus Curiae* 1a–2a (letter of July 21, 1971).

[7] Defendants' Exhibit X, p. 1.

[8] *Id.*, at 1, 2.

[9] Defendants' Exhibit Y. It is not entirely clear that the entire text of the 1966 Act was provided to the Attorney General, but for our purposes we shall assume that the Attorney General was aware of the full text.

[10] Defendants' Exhibit Z.

While continuing to press their constitutional claim in the District Court, appellants then filed an amended complaint, alleging that the 1966 Act had never been submitted to federal officials as required by § 5 of the Voting Rights Act of 1965. 79 Stat. 439, as amended, 42 U. S. C. § 1973c. A three-judge District Court was convened to decide this claim. That court reviewed South Carolina's 1971 submission and noted that the Justice Department had been made aware of the provisions of the 1966 Act. The District Court concluded that the Justice Department's request for additional information "indicates that Justice Department's review of [the 1971 Act] encompassed all aspects of the Act, including the effect of the at-large with residency requirement voting that had been implemented in 1966." App. to Juris. Statement 12a. The District Court did not find, however, that the Justice Department had been provided with any information concerning voting practices prior to 1966, or that it had been made aware of the fact that the 1966 Act embodied election practices different from those that had been in effect before 1966. Nevertheless, the District Court concluded that the Attorney General's approval of the 1971 Act, which both changed the 1966 Act by increasing the size of the Council and reenacted its remaining provisions, "renders moot any objection to the superceded 1966 provisions." *Id.*, at 13a.

After obtaining the views of the Solicitor General, who urged summary reversal of the District Court's judgment, we noted probable jurisdiction, 462 U. S. 1130 (1983), and for the reasons which follow, we now reverse.

III

The Fifteenth Amendment commands: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." The Voting Rights Act of 1965, as amended, 42 U. S. C. § 1973 *et seq.* (1976 ed. and Supp. V),[11] was enacted by Congress as a response to the "unremitting and ingenious defiance" of the command of the Fifteenth Amendment for nearly a century by state officials in certain parts of the Nation. *South Carolina* v. *Katzenbach*, 383 U. S. 301, 309 (1966). Congress concluded that case-by-case litigation under previous legislation was an unsatisfactory method to uncover and remedy the systematic discriminatory election practices in certain areas: such lawsuits were too onerous and time-consuming to prepare, obstructionist tactics by those determined to perpetuate discrimination yielded unacceptable delay, and even successful lawsuits too often merely resulted in a change in methods of discrimination. *E. g.*, H. R. Rep. No. 439, 89th Cong., 1st Sess., 9–11 (1965). Congress decided "to shift the advantage of time and inertia from the perpetrators of the evil to its victims," 383 U. S., at 328, and enacted "stringent new remedies" designed to "banish the blight of racial discrimination in voting" once and for all, *id.*, at 308.

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[11] The Voting Rights Act was enacted in 1965, Pub. L. 89–110, 79 Stat. 437, and was amended and extended in 1970, Pub. L. 91–285, 84 Stat. 314, in 1975, Pub. L. 94–73, 89 Stat. 400, and in 1982, Pub. L. 97–205, 96 Stat. 131.

The "preclearance" requirement mandated by § 5 of the Act is perhaps the most stringent of these remedies, and certainly the most extraordinary.[12] It prohibits jurisdictions

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[12] The current codification of § 5 is as follows:

"§ 1973c. Alteration of voting qualifications and procedures; action by state or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three judge district court; appeal to Supreme Court

"Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced with-which had engaged in certain violations of the Fifteenth Amendment from implementing any election practices different from those in effect on November 1, 1964, pending scrutiny by federal officials to determine whether the changes are racially discriminatory in purpose or effect. "The language of § 5 clearly provides that it applies only to proposed changes in voting procedures." *Beer* v. *United States*, 425 U. S. 130, 138 (1976). Statutory provisions constituting changes in election practices are not "effective as laws until and unless [they are] cleared pursuant to § 5." *Connor* v. *Waller*, 421 U. S. 656 (1975) *(per curiam)*. The rationale of this "uncommon exercise" of congressional power which sustained its constitutional validity was a presumption that jurisdictions which had "resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees" would be likely to engage in "similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself." *South Carolina*

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out such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court." 42 U. S. C. § 1973c.

v. *Katzenbach*, *supra*, at 334, 335 (footnote omitted). This provision must, of course, be interpreted in light of its prophylactic purpose and the historical experience which it reflects. See, *e. g.*, *McDaniel* v. *Sanchez*, 452 U. S. 130, 151 (1981).

Section 5 of the Voting Rights Act of 1965, as originally enacted, required a covered State or political subdivision desiring to implement any election practices different from those in effect on November 1, 1964, to obtain a declaratory judgment from a three-judge panel of the United States District Court for the District of Columbia holding that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" before the new practice could be implemented. 79 Stat. 439. A proviso in § 5, however, established an alternative method of obtaining federal clearance of the measure: if the new election practice was submitted to the Attorney General of the United States and the Attorney General did not interpose an objection within 60 days of the submission, the jurisdiction was permitted to implement the change.

The original voting rights bill did not contain this alternative preclearance method; but after concerns arose that the declaratory judgment route would unduly delay implementation of nondiscriminatory legislation, it appears that the proviso was added "to provide a speedy alternative method of compliance to covered States." *Morris* v. *Gressette*, 432 U. S. 491, 503 (1977). While the legislative history of the proviso is sparse, *ibid.*, the history which does exist and the lack of controversy surrounding the proviso indicate that Congress in no way intended that the substantive protections of § 5 be sacrificed in the name of expediency, though it did logically anticipate that most jurisdictions would opt for the alternative preclearance method and that declaratory judgment actions would likely be limited to those occasions on which the Attorney General interposed an objection, see H. R. Rep. No. 439, 89th Cong., 1st Sess., 26 (1965); Hearings on S. 1564 before the Senate Committee on the Judiciary, 89th Cong., 1st Sess., 237 (1965) (statement of Attorney General Katzenbach). We have previously recognized that the declaratory judgment proceeding is the "basic mechanism" for preclearance established by the Act, *United States* v. *Sheffield Board of Comm'rs*, 435 U. S. 110, 136 (1978), and that the "provision for submission to the Attorney General merely gives the covered State a rapid method of rendering a new state election law enforceable." *Allen* v. *State Board of Elections*, 393 U. S. 544, 549 (1969); *Georgia* v. *United States*, 411 U. S. 526, 538 (1973). Indeed, irrespective of which avenue of preclearance the covered jurisdiction chooses, it has the same burden of demonstrating that the changes are not motivated by a discriminatory purpose and will not have an adverse impact on minority voters, *McDaniel* v. *Sanchez*, 452 U. S. 130, 137 (1981); *Georgia* v. *United States*, *supra*, at 538, and federal officials are confronted with the same "difficult substantive issue." *Allen* v. *State Board of Elections*, *supra*, at 558.

In evaluating the use of the alternative procedure of submitting proposed changes to the Attorney General, it must be remembered that § 5 "was enacted in large part because of the acknowledged and anticipated inability of the Justice Department—given limited resources—to investigate independently all changes with respect to voting enacted by States and subdivisions covered by the Act." *Perkins* v. *Matthews*, 400 U. S. 379, 392, n. 10 (1971). Moreover, it is apparent that ambiguity concerning the scope of a preclearance is more likely if the State opts for the more expeditious method: silence constitutes consent under that method, and even when the Attorney General affirmatively states he has no objection, ambiguity may be present if the State's submission itself is ambiguous. The potential for such ambiguity was particularly pronounced prior to the adoption of detailed regulations by the Justice Department governing preclearance submissions,[13] when covered jurisdictions often merely sent a copy of new legislation to the Attorney General with a general statement that it was being submitted pursuant to § 5.

Congress has amended the Voting Rights Act several times, each time continuing the basic structure of the original preclearance provision.[14] In the legislative history of the extensions of the Act, § 5 has been deemed to be a "vital element" of the Act to ensure that "new subterfuges will be promptly discovered and enjoined." H. R. Rep. No. 91–397, p. 8 (1969). But Congress recognized that it was only as vital as state compliance allowed it to be. Unfortunately it appeared that "States rarely obeyed the mandate of that section, and the Federal Government was too timid in its enforcement." Hearings on H. R. 4249 before the Committee on the Judiciary, 91st Cong., 1st Sess., 4 (1969) (statement of Rep. McCulloch). Few changes were submitted; and only a handful of objections were interposed: "Where local officials have passed discriminatory laws, generally they have not been submitted to the Department of Justice." Hearings on H. R. 4249 before the House Committee on the Judiciary, 91st Cong., 1st Sess., 220 (1969) (statement of Attorney General Mitchell). While compliance with § 5 increased after the 1970 extension of the Voting Rights Act, and the provision was believed to have been largely responsible for gains achieved in minority political participation, H. R. Rep. No. 94–196, pp. 10–11 (1975), the continuing "widespread failure to submit proposed changes in election law for Section 5 review before attempting to implement the change" was recently viewed as "significant evidence of the continuing need for the preclearance requirement." S. Rep. No. 97–417, p. 12 (1982). The Attorney General has attempted to use several methods to identify unsubmitted changes, including the preclearance process itself, but the widespread noncompliance with the preclearance requirement, particularly acute shortly after passage of the Voting Rights Act in 1965, combined with the absence of an independent mechanism in the Justice Department to monitor changes, has permitted circumvention of the requirement which itself was designed to eliminate circumvention of the goals of the Act. H. R. Rep. No. 97–227, p. 13 (1981). Recent efforts to review finally the many unsubmitted changes made shortly after the passage of the Act in 1965 have received unqualified congressional endorsement. *Ibid.*[15]

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[13] Proposed guidelines were first published for comment in the Federal Register, 36 Fed. Reg. 9781 (1971), then were published in final form, 36 Fed. Reg. 18186 (1971), and have been codified since 1972, 28 CFR § 51.2(c) (1982).

[14] See n. 11, *supra*.

In light of the structure, purpose, history, and operation of § 5, we have rejected the suggestion that the "Act contemplates that a 'submission' occurs when the Attorney General merely becomes aware of legislation, no matter in what manner," and instead have held that "[a] fair interpretation of the Act requires that the State in some unambiguous and recordable manner submit any legislation or regulation in question directly to the Attorney General with a request for his consideration pursuant to the Act." *Whitley* v. *Williams*, decided with *Allen* v. *State Board of Elections, supra,* at 571. More recently we stated: "While the Act does provide that inaction by the Attorney General may, under certain circumstances, constitute federal preclearance of a change, the purposes of the Act would plainly be subverted if the Attorney General could ever be deemed to have approved a voting change when the proposal was neither properly submitted nor in fact evaluated by him." *United States* v. *Sheffield Board of Comm'rs, supra,* at 136. This interpretation of the provision is faithful to its history and purpose, while at the same time leaving ample room for minimizing the "potential severity of the §5 remedy," *Morris* v. *Gressette*, 432 U. S., at 504.

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[15] The Committee Report also expresses concern with respect to the failure of jurisdictions to heed objections interposed by the Attorney General. Indeed, it cites the local officials' response to the Attorney General's 1976 objection to the Edgefield County at-large election system, see n. 30, *infra,* as an example of local defiance of § 5. H. R. Rep. No. 97–227, p. 13 (1981).

IV

Edgefield County is admittedly a political subdivision of South Carolina subject to the provisions of the Voting Rights Act,[16] and it is conceded that the 1966 Act was subject to the preclearance requirement of § 5 of the Act.[17] It is also undisputed that the 1966 Act was never submitted to the Attorney General or the United States District Court for the District of Columbia for §5 review.[18] Accordingly, unless the pre-

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[16] See 28 CFR pt. 55 (1982). The District Court expressly so found. See App. to Juris. Statement 6a.

[17] The parties so stipulated. App. 131. See also App. to Juris. Statement 6a.

The only questions in an action alleging a violation of the § 5 preclearance requirement are (1) whether a change is covered by § 5, (2) if the change is covered, whether § 5's approval requirements have been satisfied, and (3) if the requirements have not been satisfied, what relief is appropriate. *Lockhart* v. *United States*, 460 U. S. 125, 129, n. 3 (1983). The question whether the 1966 Act had a discriminatory purpose or effect is not an issue at this stage of the § 5 litigation: that question must be initially decided by the District Court for the District of Columbia or the Attorney General. *Perkins* v. *Matthews*, 400 U. S. 379, 383–385 (1971); *Allen* v. *State Board of Elections*, 393 U. S. 544, 558–559 (1969). Nor is there any question that the Act was required to be submitted for preclearance—the parties have stipulated that submission was required. Given this stipulation, the parties understandably have made little effort to define precisely the nature of the changes in election practices made by the Act which required preclearance, but the briefing indicates that the parties agree that the at-large residency requirement voting scheme constituted such a change. While this matter may be more fully explored in future proceedings after remand, several changes are suggested: the different terms of office for Council members in comparison with the former Board, the basic reallocation of authority from the state legislative delegation to the Council, the shift from two appointed Board positions to at-large election of their Council counterparts, and the residency requirement applicable to all members of the Council.

[18] App. 130–131. The District Court expressly found:

"There is no dispute that Act No. 1104 of 1966 was subject to the preclearance provisions of § 5 of the Act and that county officials should have, but clearance of the 1971 amendment can be deemed to ratify the changes embodied in the 1966 Act, § 5 of the Voting Rights Act plainly invalidates those changes and the District Court must fashion appropriate relief.

As we previously observed, the preclearance procedures mandated by § 5 of the Voting Rights Act focus entirely on *changes* in election practices. *Supra,* at 245. The title of the 1971 amendment unambiguously identified the changes in election practices which it effected—an increase in the number of Council members and residency districts—and served to define the scope of the preclearance request. An examination of the correspondence concerning the 1971 submission, *supra,* at 240–241, plainly shows that only the 1971 amendment was being considered for preclearance,[19] and further indicates that the request for preclearance was viewed as limited to the change[20] in elections practices effected by it.[21]

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did not, submit the Act to the Justice Department or to the District Court for the District of Columbia for preclearance." App. to Juris. Statement 6a.

[19] Given the correspondence concerning the 1971 preclearance, even under appellees' view that a submission consists of an entire statute, rather than the changes in election practices effected by the enactment, there could be no contention in this case that the Attorney General actually considered and approved the 1966 Act itself in the course of preclearing the 1971 amendment. Quite simply, he was never, even by implication, asked to approve the 1966 statute, and he never, even by implication, purported to do so: state officials merely asked him to preclear the 1971 amendment and that is what the Attorney General did. The 1966 Act was indeed sent to the Attorney General, but it manifestly was not submitted to him for preclearance of it; it was sent to him in connection with the request for preclearance of the 1971 amendment, and was a necessary part of the submission of the 1971 amendment because the changes made by that amendment could not be identified without it.

[20] For example, the Attorney General's letter requesting additional information expressly stated: "After a preliminary examination of H2206, it does not appear that we have sufficient information to evaluate *the change you have submitted.*" Defendants' Exhibit X (emphasis supplied).

[21] In construing the correspondence in an attempt to ascertain the significance ascribed to the preclearance by the parties involved, it is significant that the correspondents were a South Carolina Assistant Attorney General

Thus South Carolina's submission of the 1971 amendment increasing the size of the Edgefield County Council apparently required the Attorney General to determine whether either the change in the district boundaries or the change in the number of districts had a discriminatory purpose or effect, but would not appear to have required him to pass on the question whether the 1966 changes represented a setback for minority voters in Edgefield County. The jurisdiction has never submitted that question to the Attorney General and has never attempted to shoulder its burden of demonstrating that the 1966 changes were nondiscriminatory.

The District Court held, however, that the Attorney General's request for additional information (including a copy of the 1966 statute and information concerning previous candidates, election results, and residency district boundaries) indicated that he had considered all aspects of the electoral scheme, including the changes effected in the 1966 Act. App. to Juris. Statement 12a. In the alternative, it held that since the 1971 amendment retained the changes effected by the 1966 Act, the lack of objection to the 1971 submission necessarily constituted approval of those changes as well and rendered the failure to preclear the 1966 Act moot. *Id.*, at 13a.

The significance the District Court attached to the Attorney General's request for additional information was wholly unwarranted. It is plain that the information which the Attorney General requested and received was merely rele-

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and a United States Assistant Attorney General in the Civil Rights Division. These officials surely knew that the preclearance procedure concerns only changes in election practices, and can be presumed to have chosen their language carefully to identify the scope of the preclearance. In this regard, appellees' contention that the the phrase "change in question" in the preclearance letter was form language is not only unavailing, but counterproductive. Form language is presumably more carefully chosen to reflect departmental policy, practice, and intentions. Moreover, to the extent that state officials had received previous preclearance letters containing such language, they were on notice that a preclearance is limited to the changes which a covered jurisdiction has identified by its submission.

vant to an identification of the changes which he had been requested to approve or to an evaluation of the purpose and effect of the changes made by the 1971 amendment which he did approve: the 1966 Act and the other information served as a benchmark allowing him to quantify the extent of the increase in the size of the Council and to compare the new district boundaries with the earlier ones. His request for and receipt of this information in no way suggest that he approved changes that he was not requested to approve.

Moreover, the information obtained in response to the Attorney General's request did not enable him to ascertain whether a covered change was made by the 1966 Act,[22] much less evaluate whether the changes made by the 1966 scheme—and unaffected by the 1971 amendment—were discriminatory in purpose or effect when compared to the 1964 practices. In order to pass on the 1966 Act, he would have needed information concerning the pre-1966 election law and its practical effects. He neither requested nor received such information.[23] Just as "no one would argue" that the Attorney General's "difficult and complex" decision "should be made without adequate information," *Georgia* v. *United States*, 411 U. S., at 540, an argument that such a decision has been made when the record indicates adequate information was lacking carries little weight. And it would require a wild flight of imagination to suggest that the Attorney General recognized that the 1966 Act effected changes which had required preclearance and had never been precleared, and then did not ask state officials to explain the failure to preclear those changes,[24] but instead embarked on the task of gathering the information necessary to evaluate those alterations on his own rather than requesting state officials to provide the information to him as he had just done regarding the changes made by the 1971 amendment. It is even more unlikely that he would have kept his consideration and approval of the changes made by the 1966 Act a secret from state officials in his letter preclearing the 1971 amendment.

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[22] Particularly in view of the legislature's practice of repealing the existing electoral statute and then reenacting some existing features along with new ones, as it did in 1971, the fact that the 1966 statute on its face was a post-1964 enactment did not necessarily imply that it had effected changes which required § 5 preclearance.

[23] Obviously, in 1971 the Attorney General either did not recognize that the 1966 Act required preclearance or assumed that it had been precleared. In the context of the submission, that was understandable. First, of course, he was not being asked to preclear the provisions of the 1966 Act. Second, the State was requested to provide the Attorney General with a copy of the statute "now in force," and by sending the 1966 Act to the Justice Department in response to this request, the South Carolina Assistant Attorney General was implicitly representing that the 1966 Act either had been precleared or had not required preclearance, for otherwise the pertinent provisions would have had no force as law. *Supra,* at 241. Moreover, though the political subdivisions of South Carolina had notably failed to submit changes on their own initiative, appellees correctly point out that the State of South Carolina was the only jurisdiction to comply rigorously with the preclearance requirement in the early years of the Act. *Perkins* v. *Matthews,* 400 U. S., at 392, n. 11 (citing table prepared by Justice

In concluding that there is insufficient evidence for a finding that the Attorney General actually considered the changes made by the 1966 Act in preclearing the 1971 amendment, we note that at the time of the 1971 submission, the Attorney General was completing promulgation of regulations governing § 5 submissions.[25] The regulations shed light

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Department). The Attorney General was obviously aware of that fact, and it is reasonable to infer that the State's compliance during this time period may have buttressed his apparent assumption that the 1966 Act either did not require submission or had been precleared.

[24] If the Attorney General was aware that the Act required preclearance and had never been precleared, his failure to request either an explanation or at least some additional information would be difficult to comprehend. He had testified before Congress that in the Department's experience, compliance with § 5 was largely limited to legitimate statutes and that jurisdictions often failed to submit laws which were discriminatory. *Supra*, at 248. Given this testimony, it seems quite unrealistic to suppose that he would consciously allow the failure to submit the 1966 Act for preclearance to pass without comment.

[25] See n. 13, *supra*.

on the correct interpretation of the scope of the changes encompassed by the Attorney General's preclearance letter, since they make clear the nature of the information necessary to constitute a valid "submission." See 28 CFR § 51.2(c) (1972).[26] The regulations indicate that the focus of the Attorney General's scrutiny of a statute was, understandably, limited to the specific changes submitted for consideration.[27] Finally, the Justice Department has recently indicated that the changes made in the 1966 Act and retained in the 1971 amendment have not been precleared, see App. to Juris. Statement 40a–42a, and such after-the-fact Justice Department statements have been previously relied upon in determining whether a particular change was actually precleared in analogous circumstances, see *United States* v. *Georgia*, Civ. Action No. C76–1531A (ND Ga., Sept. 30, 1977), summarily aff'd, 436 U. S. 941 (1978).

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[26] Under the regulations, a submission must "clearly set forth" the voting change in a manner "adequate to disclose to the Attorney General the difference between the existing and proposed situation with respect to voting." 28 CFR §§ 51.2(c), 51.5, 51.10(a)(4) (1972); 36 Fed. Reg. 18186 (1971). Among other things, a submission must include the date of final adoption of the change affecting voting, § 51.10(a)(2), and a "statement certifying that the change affecting voting has not yet been enforced or administered, or an explanation of why such a statement cannot be made." § 51.10(a)(5). The latter requirement, of course, simply reflects the requirements of § 5 itself, which provides that every change must be precleared before being enforced. Further, the guidelines make clear that submission of a particular change does not encompass all prior changes—precleared or not—that have been made since the Act's effective date in 1964. Another subsection strongly urges that, in addition to required information about the "specific change submitted for consideration," the submitting authority include a copy of "any other changes in law or administration relating to the subject matter of the submitted change affecting voting which have been put into effect since the time when coverage under section 4 of the Voting Rights Act began and the reasons for such prior changes. If such changes have already been submitted the submitting authority may refer to the date of prior submission and identify the previously submitted changes." 28 CFR § 51.10(b)(4) (1972).

[27] Naturally, the Attorney General did not determine whether the differences between the 1971 amendment and the 1966 Act were nondiscriminatory in an analytical vacuum, but necessarily evaluated the purpose and effect of those changes in the context of the entire electoral scheme. See *Lockhart* v. *United States*, 460 U. S., at 131–132.

The District Court also erred in viewing the submission's scope as encompassing all features of the 1971 amendment, rather than the changes effected by that particular enactment. When a jurisdiction adopts legislation that makes clearly defined changes in its election practices, sending that legislation to the Attorney General merely with a general request for preclearance pursuant to § 5 constitutes a submission of the changes made by the enactment and cannot be deemed a submission of changes made by previous legislation which themselves were independently subject to § 5 preclearance.[28] The fact that a covered jurisdiction adopted a new election practice after the effective date of the Voting Rights Act raises, in effect, a statutory inference that the practice may have been adopted for a discriminatory purpose or may have a discriminatory effect and places the burden on the jurisdiction to establish that the practice is not discriminatory. A request for preclearance of certain identified changes in election practices which fails to identify other practices as new ones thus cannot be considered an adequate submission of the latter practices. In this case, the 1971 submission failed to inform the Attorney General that the provisions of the 1971 amendment which merely recodified various practices contained in the 1966 Act were themselves changes that might give rise to an inference of discrimination.

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[28] There is an analytical distinction between two questions: whether a particular electoral provision was subject to § 5 preclearance, and whether it was actually submitted for preclearance on a particular occasion. Even though a number of the elements of an electoral scheme are subject to preclearance and should be submitted, only some of those features may actually be submitted for review. In that situation, the Attorney General's failure to object to the submission would not constitute preclearance of elements in the scheme that were not submitted. As we stated in *Morris* v. *Gressette*, 432 U. S. 491, 504 (1977): "The congressional intent is plain: The extraordinary remedy of postponing the implementation of validly enacted state legislation was to come to an end when the Attorney General failed to interpose a timely objection based on a *complete submission*." (Emphasis supplied.)

In this case, state officials had independent submission burdens respecting both the 1966 changes and the 1971 changes, but only met their burden respecting the latter changes.

To the extent there was any ambiguity in the scope of the preclearance request, the structure and purpose of the preclearance requirement plainly counsel against resolving such ambiguities in favor of the submitting jurisdiction in the circumstances of this case. The preclearance process is by design a stringent one; it is predicated on the congressional finding that there is a risk that covered jurisdictions may attempt to circumvent the protections afforded by the Act; the burden of proof (the risk of nonpersuasion) is placed upon the covered jurisdiction; and submissions under the alternative preclearance method—adopted for the convenience of the covered jurisdictions while Congress recognized the inability of the Justice Department independently to monitor and to identify changes in election practices—should be carefully construed to protect the remedial aims of the Act. Moreover, the congressional assessment of the practical operation of the provision in the years since its adoption clearly indicates Congress' continuing intent to guard against any diminution in the potency of the provision, and an intent to continue to insist upon submission of changes which had previously not been submitted. The broad scope given to the 1971 submission by the District Court, and its conclusion that submitting the 1971 amendment rendered the failure to preclear the 1966 Act moot, are inconsistent with the foregoing governing principles.

In summary, to the extent the judgment below may be interpreted as resting upon a factual finding that the Attorney General actually considered and approved the changes made by the 1966 Act in the course of the submission of the 1971 amendment, after reviewing the evidence ourselves we are "left with the definite and firm conviction that a mistake has been committed,"[29] and we thus overturn that finding as clearly erroneous. The District Court erred as a matter of law in concluding that the lack of objection to the 1971 submission rendered the failure to preclear the 1966 Act moot.[30]

Accordingly, we reverse the District Court's judgment and remand to the District Court for proceedings consistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN, JUSTICE POWELL, and JUSTICE REHNQUIST concur in the judgment.

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[29] *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395 (1948).

[30] In view of our holding, it is unnecessary for us to address the second question presented by appellants: whether under the circumstances Edgefield County's adoption of a council-administrator form of government in June 1976—objected to by the Attorney General—was subject to § 5 preclearance.

FLANAGAN ET AL. v. UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 82–374. Argued November 30, 1983—Decided February 21, 1984

Petitioners, four Philadelphia police officers, were indicted by a federal grand jury for conspiring to deprive citizens of their civil rights and for committing substantive civil rights offenses. Prior to the return of the indictment, petitioners had retained a certain law firm to act as joint counsel, and continued the joint representation after the indictment, even though the indictment did not make the same allegations against all petitioners. After three of the petitioners moved to sever their case from the fourth petitioner's and after petitioners moved to dismiss the conspiracy count, the District Court granted the Government's motion to disqualify the law firm from its multiple representation. The Court of Appeals affirmed, noting that it had jurisdiction under 28 U. S. C. § 1291, because the disqualification order was appealable prior to trial as a collateral order.

Held: The disqualification order was not immediately appealable under § 1291, and hence the Court of Appeals had no jurisdiction to review the order prior to entry of final judgment in the case. Pp. 263–270.

(a) The policy embodied in § 1291, which limits the jurisdiction of the courts of appeals to appeals from "final decisions of the district courts," is inimical to piecemeal appellate review of trial court decisions that do not terminate the litigation. This policy is at its strongest in the field of criminal law. Pp. 263–265.

(b) To come within the "collateral order" exception to the final judgment rule, a trial court order must (1) "conclusively determine the disputed question," (2) "resolve an important issue completely separate from the merits of the action," and (3) "be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 468. A counsel disqualification order is not analogous to any of the three types of interlocutory orders—orders denying motions to reduce bail or to dismiss an indictment on double jeopardy or speech or debate grounds—that this Court has found immediately appealable in criminal cases as collateral-order exceptions. Nothing about a counsel disqualification order distinguishes it from the run of pretrial decisions that affect the rights of criminal defendants yet must await completion of trial court proceedings for review. Such an order fails to satisfy the stringent *Coopers & Lybrand* conditions for qualification as an immediately appealable collateral order, and the overriding policies against interlocutory review in criminal cases apply in full. Pp. 265–270.

679 F. 2d 1072, reversed and remanded.

O'CONNOR, J., delivered the opinion for a unanimous Court.

Edward H. Rubenstone argued the cause for petitioners. With him on the briefs was *Richard A. Sprague.*

Deputy Solicitor General Frey argued the cause for the United States. With him on the brief was *Solicitor General Lee, Assistant Attorney General Trott, Richard G. Wilkins,* and *Peter D. Isakoff.**

JUSTICE O'CONNOR delivered the opinion of the Court.

In *Firestone Tire & Rubber Co.* v. *Risjord,* 449 U. S. 368 (1981), the Court held that a pretrial denial of a motion to disqualify counsel in a civil case is not appealable prior to trial under 28 U. S. C. § 1291 as a final collateral order. The Court reserved the questions of the immediate appealability of pretrial denials of disqualification motions in criminal cases and of pretrial grants of disqualification motions in both criminal and civil cases. *Id.,* at 372, n. 8. We decide today that a District Court's pretrial disqualification of defense counsel in a criminal prosecution is not immediately appealable under 28 U. S. C. § 1291.

I

Petitioners are four police officers who formed a "grandpop" decoy squad in the Philadelphia Police Department. Petitioner Flanagan would pose as an aged derelict, a likely target for street criminals. When Flanagan gave the standard alarm, the other members of the decoy team would move in to make an arrest.

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union by *James D. Crawford, Burt Neuborne,* and *Charles S. Sims;* and for the National Association of Criminal Defense Lawyers et al. by *Eugene G. Iredale* and *James M. Shellow.*

A federal grand jury in the Eastern District of Pennsylvania indicted petitioners in September 1981. The indictment alleged that petitioners had conspired to make arrests without probable cause and had unlawfully arrested and abused eight people. One count of the indictment charged petitioners with conspiring to deprive citizens of their civil rights in violation of 18 U. S. C. §241. The remaining 12 counts charged petitioners, in various combinations, with committing substantive civil rights offenses in violation of 18 U. S. C. §242.

Prior to the return of the indictment, petitioners had retained the law firm of Sprague and Rubenstone to act as joint counsel. Petitioners decided to continue the joint representation after the indictment was handed down, even though the indictment did not make the same allegations against all petitioners. Petitioners Keweshan, Landis, and McNamee, however, moved to sever their case from petitioner Flanagan's, arguing that the Government's evidence against Flanagan alone was so much greater than the evidence against them that severance was necessary to avoid prejudicial spillover. In addition, based on the asserted differences in their involvement in the activities alleged in the substantive counts of the indictment, petitioners moved to dismiss the conspiracy count. The Government responded by moving to disqualify Sprague and Rubenstone from its multiple representation of petitioners and by asking the court to inquire into the representation as required by Federal Rule of Criminal Procedure 44(c).[1]

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[1] Federal Rule of Criminal Procedure 44(c) provides:

"Whenever two or more defendants have been jointly charged . . . or have been joined for trial . . . , and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel."

In early December 1981, following a hearing and briefing on the Government's motion, the District Court disqualified the law firm from participation in the case. The court found that no actual conflict of interest had yet developed but that there was a clear potential for conflict. Most notably, the severance motion and supporting papers showed that petitioner Flanagan's interests were likely to diverge from the other petitioners' interests. The District Court also found that petitioners had voluntarily, knowingly, and intelligently waived their right to conflict-free representation. The court concluded, however, that it had the authority and, indeed, the obligation under Rule 44(c) to disqualify counsel when "the likelihood is great that a potential conflict may escalate into an actual conflict." 527 F. Supp. 902, 909 (ED Pa. 1981). The court presumed that Sprague and Rubenstone had obtained privileged information from each of the petitioners and therefore disqualified the law firm from representing any of them.

Petitioners appealed to the United States Court of Appeals for the Third Circuit, which affirmed the decision of the District Court in June 1982. 679 F. 2d 1072. Although jurisdiction was not challenged, the Court of Appeals noted that it had jurisdiction under 28 U. S. C. § 1291 because the disqualification order was appealable prior to trial as a collateral order within the meaning of *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949). The court went on to hold that the disqualification order was proper because an actual conflict of interest was very likely to arise. In July 1982 the court denied rehearing but stayed issuance of the mandate to permit filing of a petition for a writ of certiorari in this Court.

Petitioners filed their petition in September 1982, one year after the grand jury had returned the indictment against them. They contended that disqualification of counsel of their choice after they had knowingly waived conflict-free representation deprived them of their Sixth Amendment right to assistance of counsel and of their Fifth Amendment due process right to present a common defense through joint counsel. We granted certiorari in January 1983. 459 U. S. 1101. The parties briefed and argued both the merits and the jurisdictional question—whether the disqualification order was immediately appealable under 28 U. S. C. § 1291. We now reverse the judgment of the Court of Appeals because we conclude that the court had no jurisdiction to review the disqualification order prior to entry of final judgment in the criminal case.[2]

II

"Finality as a condition of review is an historic characteristic of federal appellate procedure." *Cobbledick* v. *United States*, 309 U. S. 323, 324 (1940). Thus, the jurisdictional statute applicable to this case limits the jurisdiction of the courts of appeals to appeals from "final decisions of the district courts." 28 U. S. C. § 1291. This final judgment rule requires that "a party must ordinarily raise all claims of error in a single appeal following final judgment on the merits." *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U. S., at 374. In a criminal case the rule prohibits appellate review until conviction and imposition of sentence. *Berman* v. *United States*, 302 U. S. 211, 212 (1937).

The final judgment rule serves several important interests. It helps preserve the respect due trial judges by minimizing appellate-court interference with the numerous decisions they must make in the prejudgment stages of litigation. It reduces the ability of litigants to harass opponents and to clog the courts through a succession of costly and time-consuming appeals. It is crucial to the efficient administration of justice. *Firestone Tire & Rubber Co.* v. *Risjord*, *supra*, at 374. For these reasons, "[t]his Court has long held that the policy of Congress embodied in [§ 1291] is inimical to piecemeal appellate review of trial court decisions which do not terminate the litigation . . . ." *United States* v. *Hollywood Motor Car Co.*, 458 U. S. 263, 265 (1982).

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[2] Among the Courts of Appeals, six Circuits in addition to the Third Circuit have allowed immediate appeal of pretrial disqualifications of criminal defense counsel. *United States* v. *Curcio*, 694 F. 2d 14, 19–20 (CA2 1982); *United States* v. *Smith*, 653 F. 2d 126 (CA4 1981) (entertaining appeal without discussion of appealability question); *United States* v. *Garcia*, 517 F. 2d 272, 275 (CA5 1975); *United States* v. *Phillips*, 699 F. 2d 798, 801 (CA6 1983); *United States* v. *Agosto*, 675 F. 2d 965, 968, n. 1 (CA8), cert. denied after remand and affirmance *sub nom. Gustafson* v. *United States*, 459 U. S. 834 (1982); *United States* v. *Hobson*, 672 F. 2d 825, 826 (CA11), cert. denied, 459 U. S. 906 (1982). The Ninth Circuit has held that such orders are not immediately appealable. *United States* v. *Greger*, 657 F. 2d 1109, 1110–1113 (1981), cert. denied, 461 U. S. 913 (1983).

The Court has also long held that "this policy is at its strongest in the field of criminal law." *Ibid.* More than 40 years ago the Court noted that the reasons for the final judgment rule are "especially compelling in the administration of criminal justice." *Cobbledick* v. *United States*, *supra*, at 325. Promptness in bringing a criminal case to trial has become increasingly important as crime has increased, court dockets have swelled, and detention facilities have become overcrowded.

As the Sixth Amendment's guarantee of a speedy trial indicates, the accused may have a strong interest in speedy resolution of the charges against him. In addition, "there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused." *Barker* v. *Wingo*, 407 U. S. 514, 519 (1972). As time passes, the prosecution's ability to meet its burden of proof may greatly diminish: evidence and witnesses may disappear, and testimony becomes more easily impeachable as the events recounted become more remote. Delay increases the cost of pretrial detention and extends "the period during which defendants released on bail may commit other crimes." *United States* v. *MacDonald*, 435 U. S. 850, 862 (1978). Delay between arrest and punishment prolongs public anxiety over community safety if a person accused of a serious crime is free on bail. It may also adversely affect the prospects for rehabilitation. See *Barker* v. *Wingo*, *supra*, at

520. Finally, when a crime is committed against a community, the community has a strong collective psychological and moral interest in swiftly bringing the person responsible to justice. Prompt acquittal of a person wrongly accused, which forces prosecutorial investigation to continue, is as important as prompt conviction and sentence of a person rightly accused. Crime inflicts a wound on the community, and that wound may not begin to heal until criminal proceedings have come to an end.

The importance of the final judgment rule has led the Court to permit departures from the rule "only when observance of it would practically defeat the right to any review at all." *Cobbledick* v. *United States*, *supra*, at 324–325 (footnote omitted). The Court has allowed a departure only for the "limited category of cases falling within the 'collateral order' exception delineated in *Cohen* . . . ." *United States* v. *Hollywood Motor Car Co.*, *supra*, at 265.[3] To come within this "narrow exception," *Firestone Tire & Rubber Co.* v. *Risjord*, *supra*, at 374, a trial court order must, at a minimum, meet three conditions. First, it "must conclusively determine the disputed question"; second, it must "resolve an important issue completely separate from the merits of the action"; third, it must "be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 468 (1978) (footnote omitted).

Because of the compelling interest in prompt trials, the Court has interpreted the requirements of the collateral-order exception to the final judgment rule with the utmost strictness in criminal cases. The Court has found only three types of pretrial orders in criminal prosecutions to meet the requirements. See *United States* v. *Hollywood Motor Car Co.*, 458 U. S., at 265. Each type involves "'an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial.'" *Id.*, at 266 (quoting *United States* v. *MacDonald*, *supra*, at 860).

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[3] Title 18 U. S. C. § 3731 provides a statutory exception to the final judgment rule for certain orders suppressing or excluding evidence. That provision is not at issue in this case, which concerns only the finality requirement of 28 U. S. C. § 1291. This case likewise does not involve the finality problems that arise in appeals from state-court decisions to this Court under 28 U. S. C. § 1257. See *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469 (1975).

An order denying a motion to reduce bail may be reviewed before trial. The issue is finally resolved and is independent of the issues to be tried, and the order becomes moot if review awaits conviction and sentence. *Stack* v. *Boyle*, 342 U. S. 1 (1951). Orders denying motions to dismiss an indictment on double jeopardy or speech or debate grounds are likewise immediately appealable. Such orders finally resolve issues that are separate from guilt or innocence, and appellate review must occur before trial to be fully effective. The right guaranteed by the Double Jeopardy Clause is more than the right not to be convicted in a second prosecution for an offense: it is the right not to be "placed in jeopardy"—that is, not to be tried for the offense. *Abney* v. *United States*, 431 U. S. 651 (1977). Similarly, the right guaranteed by the Speech or Debate Clause is more than the right not to be convicted for certain legislative activities: it is the right not to "be questioned" about them—that is, not to be tried for them. *Helstoski* v. *Meanor*, 442 U. S. 500 (1979). Refusals to dismiss an indictment for violation of the Double Jeopardy Clause or of the Speech or Debate Clause, like denials of bail reduction, are truly final and collateral, and the asserted rights in all three cases would be irretrievably lost if review were postponed until trial is completed.

An order disqualifying counsel lacks the critical characteristics that make orders denying bail reduction or refusing to dismiss on double jeopardy or speech or debate grounds immediately appealable. Unlike a request for bail reduction, a constitutional objection to counsel's disqualification is in no danger of becoming moot upon conviction and sentence. Moreover, it cannot be said that the right petitioners assert, whether based on the Due Process Clause of the Fifth

Amendment or on the Assistance of Counsel Clause of the Sixth Amendment, is a right not to be tried. Double jeopardy and speech or debate rights are *sui generis* in this regard. See *United States* v. *MacDonald*, 435 U. S., at 860, n. 7. Rather, just as the speedy trial right is merely a right not to be convicted at an excessively delayed trial, *id.*, at 860–861, the asserted right not to have joint counsel disqualified is, like virtually all rights of criminal defendants, merely a right not to be convicted in certain circumstances. Unlike a double jeopardy or speech or debate claim, petitioners' claim "would be largely satisfied by an acquittal resulting from the prosecution's failure to carry its burden of proof." *Id.*, at 859. See also *United States* v. *Hollywood Motor Car Co.*, *supra*, at 268 (vindictive prosecution right fully protected by postconviction review). "Bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship." *Cobbledick* v. *United States*, 309 U. S., at 325. See also *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 30 (1943).

A disqualification order thus is not analogous to any of the three types of interlocutory orders that this Court has found immediately appealable in criminal cases. Accordingly, *Stack*, *Abney*, and *Helstoski* provide no authority for petitioners' assertion that a disqualification order satisfies the three necessary conditions for coverage by the collateral-order exception. Nor does petitioners' jurisdictional assertion gain support from a direct inquiry into whether a disqualification order satisfies the three *Coopers & Lybrand* conditions. This is so regardless of the nature of the right to joint representation claimed by petitioners.[4]

Petitioners correctly concede that postconviction review of a disqualification order is fully effective to the extent that the asserted right to counsel of one's choice is like, for example, the Sixth Amendment right to represent oneself. See *Faretta* v. *California*, 422 U. S. 806 (1975). Obtaining reversal for violation of such a right does not require a showing of prejudice to the defense, since the right reflects constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding. See *McKaskle* v. *Wiggins*, *ante*, at 177–178, n. 8. Similarly, postconviction review is concededly effective to the extent that petitioners' asserted right is like the Sixth Amendment rights violated when a trial court denies appointment of counsel altogether, see *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), or denies counsel's request to be replaced because of a conflict of interest, see *Holloway* v. *Arkansas*, 435 U. S. 475 (1978). No showing of prejudice need be made to obtain reversal in these circumstances because prejudice to the defense is presumed. In sum, as petitioners concede, if establishing a violation of their asserted right requires no showing of prejudice to their defense, a pretrial order violating the right does not meet the third condition for coverage by the collateral-order exception: it is not "effectively unreviewable on appeal from a final judgment." See *supra*, at 265.

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[4] We need not and do not express any view on the nature or existence of that right.

If, on the other hand, petitioners' asserted right is one that is not violated absent some specifically demonstrated prejudice to the defense, a disqualification order still falls outside the coverage of the collateral-order exception. We need not consider, however, whether the third *Coopers & Lybrand* condition is satisfied—that is, whether postconviction review is plainly ineffective. It is sufficient to note that the second *Coopers & Lybrand* condition—that the order be truly collateral—is not satisfied if petitioners' asserted right is one requiring prejudice to the defense for its violation.

On this assumption, a disqualification order, though final, is not independent of the issues to be tried. Its validity cannot be adequately reviewed until trial is complete. The effect of the disqualification on the defense, and hence whether the asserted right has been violated, cannot be fairly assessed until the substance of the prosecution's and defendant's cases is known. In this respect the right claimed by petitioners is analogous to the speedy trial right. In *United States* v. *MacDonald*, *supra*, at 859, 860, the Court concluded that because impairment of the defense is an important factor in judging whether a speedy trial violation has occurred, a denial of a motion to dismiss on speedy trial grounds is not separable from the issues at trial. The same conclusion applies to a disqualification order if prejudice to the defense is a necessary element of petitioners' claim. In these circumstances, the second *Coopers & Lybrand* condition for immediate appealability as a collateral order is not satisfied: the disqualification order does not resolve an "issue completely separate from the merits of the action." See *supra*, at 265.

In short, whether or not petitioners' claim requires a showing of prejudice, a disqualification order does not qualify as an immediately appealable collateral order in a straightforward application of the necessary conditions laid down in prior cases. Further, petitioners' claim does not justify expanding the small class of criminal case orders covered by the collateral-order exception to the final judgment rule—either by eliminating any of the *Coopers & Lybrand* conditions or by interpreting them less strictly than the Court's cases have done. The costs of such expansion are great, and the potential rewards are small.

Unlike an appeal of a bail decision, see *Stack* v. *Boyle*, 342 U. S., at 12 (opinion of Jackson, J.), an appeal of a disqualification order interrupts the trial. In criminal cases such interruption exacts a presumptively prohibitive price. See *supra*, at 264–265. Moreover, an appellate court's reversal of a disqualification order would not result in dismissal of the prosecution. The prosecution would continue, though only after long delay. The potential rewards of an immediate appeal are thus even smaller than they were in *United States* v. *MacDonald*, *supra*, and in *United States* v. *Hollywood Motor*

Car Co., *supra*, where the Court rejected claims of immediate appealability for orders denying motions to dismiss on speedy trial and vindictive prosecution grounds even though reversal of the orders would have led to dismissal of all or some charges. See also *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21 (1943) (no pretrial review of order denying motion to dismiss indictment for lack of jurisdiction); *Heike* v. *United States*, 217 U. S. 423, 430–431 (1910) (no pretrial review of order rejecting claim of statutory immunity from prosecution). Here, a delayed trial is a certain result of interlocutory appellate review. Allowing immediate appeal of a disqualification order thus would severely undermine the policies behind the final judgment rule.

III

"'[T]he final judgment rule is the dominant rule in federal appellate practice.' 6 Moore, Federal Practice (2d ed. 1953), 113. Particularly is this true of criminal prosecutions." *DiBella* v. *United States*, 369 U. S. 121, 126 (1962). Nothing about a disqualification order distinguishes it from the run of pretrial judicial decisions that affect the rights of criminal defendants yet must await completion of trial court proceedings for review. Such an order fails to satisfy the stringent conditions for qualification as an immediately appealable collateral order, and the overriding policies against interlocutory review in criminal cases apply in full. The exceptions to the final judgment rule in criminal cases are rare. An order disqualifying counsel is not one.

The judgment of the Court of Appeals is accordingly reversed. On remand the appeal should be dismissed.

It is so ordered.

MINNESOTA STATE BOARD FOR COMMUNITY COLLEGES *v.* KNIGHT ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT, DISTRICT OF MINNESOTA, FOURTH DIVISION

No. 82-898. Argued November 1, 1983—Decided February 21, 1984*

The Minnesota Public Employment Labor Relations Act (PELRA) authorizes state employees to bargain collectively over terms and conditions of employment. The statute also grants professional employees, such as college faculty, the right to "meet and confer" with their employers on matters related to employment that are outside the scope of mandatory bargaining. However, if professional employees forming an appropriate bargaining unit have selected an exclusive representative for mandatory bargaining, their employer may "meet and confer" on nonmandatory subjects only with that representative. Appellant Minnesota State Board for Community Colleges (Board) operates the Minnesota community college system, and appellant Minnesota Community College Faculty Association (MCCFA) is the designated exclusive representative of the faculty of the State's community colleges. On the state level, MCCFA and the Board established "meet and confer" committees to discuss policy questions applicable to the entire system. On the campus level, the MCCFA chapters and the college administrations created local "meet and confer" committees to discuss policy questions applicable only to the campus. Appellees, 20 Minnesota community college faculty instructors who are not members of MCCFA, filed suit in Federal District Court, challenging, *inter alia*, the constitutionality of MCCFA's exclusive representation of community college faculty in the "meet and confer" processes. The District Court held that the "meet and confer" provisions of PELRA deprived appellees of their First and Fourteenth Amendment speech and associational rights by denying them an opportunity to participate in their employer's making of policy, and the court granted declaratory and injunctive relief.

Held: The "meet and confer" provisions do not violate appellees' constitutional rights. Pp. 280–292.

(a) Appellees have no constitutional right, either as members of the public, as state employees, or as college instructors, to force officers of the State acting in an official policymaking capacity to listen to appellees'

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*Together with No. 82-977, *Minnesota Community College Faculty Association et al.* v. *Knight et al.*, also on appeal from the same court.

views. Nothing in the First Amendment or in this Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to communications of members of the public on public issues. Neither appellees' status as public employees nor the fact that an academic setting is involved gives them any special constitutional right to a voice in the making of policy by their employer. Even assuming that First Amendment speech rights take on a special meaning in an academic setting, they do not require government to allow teachers to participate in institutional policymaking. Pp. 280–288.

(b) Appellees' speech and associational rights have not been infringed by PELRA's restriction of participation in "meet and confer" sessions to the faculty's exclusive representative. The State has not restrained appellees' freedom to speak on any education-related issue or to associate or not to associate with whom they please, including the exclusive representative. Nor has the State attempted to suppress ideas. Similarly, appellees' associational freedom has not been impaired, since they are free to form whatever advocacy groups they like. Pp. 288–290.

(c) Appellees' exclusion from "meet and confer" sessions does not deny them equal protection of the laws in violation of the Fourteenth Amendment. The State has a legitimate interest in ensuring that its public employers hear one, and only one, voice presenting the majority view of its professional employees on employment-related policy questions, and permitting selection of "meet and confer" representatives to be made by the exclusive representative is a rational means of serving that interest. Pp. 291–292.

571 F. Supp. 1, reversed.

O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and REHNQUIST, JJ., joined. MARSHALL, J., filed an opinion concurring in the judgment, *post*, p. 292. BRENNAN, J., filed a dissenting opinion, *post*, p. 295. STEVENS, J., filed a dissenting opinion, in all but Part III of which BRENNAN, J., joined, and in all but Part II of which POWELL, J., joined, *post*, p. 300.

Eric R. Miller argued the cause for appellants. With him on the briefs for appellants in No. 82–977 was *Donald W. Selzer, Jr.* *Hubert H. Humphrey III*, Attorney General of Minnesota, and *Donald J. Mueting*, *Sheila S. Fishman*, and *Brad P. Engdahl*, Special Assistant Attorneys General, filed briefs for appellant in No. 82–898.

Edwin Vieira, Jr., argued the cause for appellees. With him on the brief was *Darel F. Swenson.*†

JUSTICE O'CONNOR delivered the opinion of the Court.

The State of Minnesota authorizes its public employees to bargain collectively over terms and conditions of employment. It also requires public employers to engage in official exchanges of views with their professional employees on policy questions relating to employment but outside the scope of mandatory bargaining. If professional employees forming an appropriate bargaining unit have selected an exclusive representative for mandatory bargaining, their employer may exchange views on nonmandatory subjects only with the exclusive representative. The question presented in these cases is whether this restriction on participation in the nonmandatory-subject exchange process violates the constitutional rights of professional employees within the bargaining unit who are not members of the exclusive representative and who may disagree with its views. We hold that it does not.

I

A

In 1971, the Minnesota Legislature adopted the Public Employment Labor Relations Act (PELRA), Minn. Stat. § 179.61 *et seq.* (1982), to establish "orderly and constructive relationships between all public employers and their employees . . . ." § 179.61. The public employers covered by the law are, broadly speaking, the State and its political subdivisions, agencies, and instrumentalities. § 179.63. In its amended form, as in its original form, PELRA provides for the division of public employees into appropriate bargaining units and establishes a procedure, based on majority support within a unit, for the designation of an exclusive bargaining agent for that unit. §§179.67, 179.71, 179.741. The statute requires public employers to "meet and negotiate" with exclusive representatives concerning the "terms and conditions of employment," which the statute defines to mean "the hours of employment, the compensation therefor . . . , and the employer's personnel policies affecting the working conditions of the employees." §§179.63, 179.67, 179.71. The employer's and employees' representatives must seek an agreement in good faith. §179.63, subd. 16.

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†*J. Albert Woll*, *Marsha S. Berzon*, and *Laurence Gold* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging reversal.

Ann H. Franke, *Lawrence White*, and *Ralph S. Spritzer* filed a brief for the American Association of University Professors as *amicus curiae.*

PELRA also grants professional employees, such as college faculty, the right to "meet and confer" with their employers on matters related to employment that are outside the scope of mandatory negotiations. §§179.63, 179.65. This provision rests on the recognition that "professional employees possess knowledge, expertise, and dedication which is helpful and necessary to the operation and quality of public services and which may assist public employers in developing their policies." §179.73. The statute declares it to be the State's policy to "encourage close cooperation between public employers and professional employees" by providing for "meet and confer" sessions on all employment-related questions not subject to mandatory bargaining. *Ibid.* There is no statutory provision concerning the "meet and confer" process, however, that requires good-faith efforts to reach agreement. See *Minneapolis Federation of Teachers Local 59* v. *Minneapolis Special School Dist. No. 1*, 258 N. W. 2d 802, 804, n. 2 (Minn. 1977).

PELRA requires professional employees to select a representative to "meet and confer" with their public employer. Minn. Stat. §179.73 (1982). If professional employees in an appropriate bargaining unit have an exclusive representative to "meet and negotiate" with their employer, that representative serves as the "meet and confer" representative as well.

Indeed, the employer may neither "meet and negotiate" nor "meet and confer" with any members of that bargaining unit except through their exclusive representative. § 179.66, subd. 7. This restriction, however, does not prevent professional employees from submitting advice or recommendations to their employer as part of their work assignment. *Ibid.* Moreover, nothing in PELRA restricts the right of any public employee to speak on any "matter related to the conditions or compensation of public employment or their betterment" as long as doing so "is not designed to and does not interfere with the full faithful and proper performance of the duties of employment or circumvent the rights of the exclusive representative if there be one." § 179.65, subd. 1.

B

Appellant Minnesota State Board for Community Colleges (State Board) operates the Minnesota community college system. At the time of trial, the system comprised 18 institutions located throughout the State. Each community college is administered by a president, who reports, through the chancellor of the system, to the State Board.

Prior to 1971, Minnesota's community colleges were governed in a variety of ways. On some campuses, faculty had a strong voice in administrative policymaking, expressed through organizations such as faculty senates. On other campuses, the administration consulted very little with the faculty. Irrespective of the level of faculty involvement in governance, however, the administrations of the colleges retained final authority to make policy.

Following enactment of PELRA, appellant Minnesota Community College Faculty Association (MCCFA)[1] was designated the exclusive representative of the faculty of the

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[1] MCCFA is affiliated with the Minnesota Education Association (MEA) and the National Education Association (NEA), also appellants in these cases.

State's community colleges, which had been deemed a single bargaining unit.[2] MCCFA has "met and negotiated" and "met and conferred" with the State Board since 1971. The result has been the negotiation of successive collective-bargaining agreements in the intervening years and, in order to implement the "meet and confer" provision, a restructuring of governance practices in the community college system.

On the state level, MCCFA and the Board established "meet and confer" committees to discuss questions of policy applicable to the entire system. On the campus level, the MCCFA chapters and the college administrations created local "meet and confer" committees—also referred to as "exchange of views" committees—to discuss questions of policy applicable only to the campus. The committees on both levels have discussed such topics as the selection and evaluation of administrators, academic accreditation, student affairs, curriculum, and fiscal planning—all policy matters within the control of the college administrations and the State Board. App. to Juris. Statement A–49.

The State Board considers the views expressed by the statewide faculty "meet and confer" committees to be the faculty's official collective position. It recognizes, however, that not every instructor agrees with the official faculty view on every policy question. Not every instructor in the bargaining unit is a member of MCCFA, and MCCFA has selected only its own members to represent it on "meet and confer" committees. Accordingly, all faculty have been free to communicate to the State Board and to local administrations their views on questions within the coverage of the statutory "meet and confer" provision. *Id.*, at A–50, A–52. They have frequently done so.[3] With the possible exception of a brief period of adjustment to the new governance structure, during which some administrators were reluctant to communicate informally with faculty, individual faculty members have not been impeded by either MCCFA or college administrators in the communication of their views on policy questions. *Id.*, at A–50. Nor has PELRA ever been construed to impede such communication.[4]

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[2] Since 1980, the "community college instructional unit" has been defined by statute. Minn. Stat. § 179.741 (1982).

[3] Indeed, both the Board and the local administrations have regularly made efforts to supplement the "official" advice with other, unofficial communications. Prior to each on-campus Board meeting, the Board has made itself available to persons who wish to express their views individ-

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ually or in groups. In addition, many faculty members have met with or written to the Board or the system's chancellor to communicate their individual views. On the local level, college presidents have used a variety of means to solicit opinions from their instructors and students, including making themselves available at collegewide "town meetings" or at commons areas, hosting luncheons and breakfasts, appearing at faculty meetings, and inviting faculty advice through maintenance of an "open-door" policy. See App. A–57, A–61 to A–64, A–83 to A–84, A–99 to A–103. Thus, while the "meet and confer" process gives weight to an official collective faculty position as formulated by the faculty's exclusive representative, all instructors have ample opportunity to express their views to their employer on subjects within the purview of the "meet and confer" process.

[4] The repeated suggestions in JUSTICE STEVENS' dissent that the state employer and state employees have been prohibited or deterred by the statute from talking with each other on policy questions, *e. g., post,* at 302–307, 310–311, 312, 322, misunderstand the statute and are flatly contradicted by the District Court's findings. All that the statute prohibits is the formal exchange of views called a "meet and confer" session. It in no way impairs the ability of individual employees or groups of employees to express their views to their employer outside that formal context, and there has been no suggestion in these cases that, after an initial period of adjustment to PELRA, any such communication of views has ever been restrained because it was challenged as constituting a formal "meet and confer" session. None of the testimony selectively quoted by JUSTICE STEVENS' dissent recites a single instance of such restraint, and the quoted passages make clear that the prohibition on the employer's holding "meet and confer" sessions with anyone but the exclusive representative has been understood to bar only a certain type of formal exchange, not other exchanges of views. *E. g., post,* at 305, n. 6, 307, n. 9.

Indeed, the District Court made the following findings of fact: "[A]ll faculty have the right to informally communicate their individual views to administrators and [the State Board] and MCCFA have never attempted to deny or abridge such rights." App. to Juris. Statement A–50. "The right of all faculty, both members and nonmembers of MCCFA, to communicate

C

Appellees are 20 Minnesota community college faculty instructors who are not members of MCCFA. In December 1974, they filed suit in the United States District Court for the District of Minnesota, challenging the constitutionality of MCCFA's exclusive representation of community college faculty in both the "meet and negotiate" and "meet and confer" processes. A three-judge District Court was convened to hear the case. A Special Master appointed by the court conducted the trial in 1980 and submitted recommended findings of fact in early 1981. *Id.*, at A–54 to A–81. The three-judge District Court issued its findings of fact in late 1981, *id.*, at A–32 to A–54, and its decision on the legal claims in early 1982, 571 F. Supp. 1.

The court rejected appellees' attack on the constitutionality of exclusive representation in bargaining over terms and conditions of employment, relying chiefly on *Abood* v. *Detroit Board of Education*, 431 U. S. 209 (1977). The court agreed with appellees, however, that PELRA, as applied in the community college system, infringes First and Fourteenth Amendment speech and associational rights of faculty who

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informally and individually with administrative officials has not been impaired . . . ." *Id.*, at A–52. "The plaintiffs have failed to demonstrate any direct, indirect, actual or potential impairment of their associational and free speech rights, except as indicated in [three findings]." *Ibid.* Those findings were that plaintiffs are impaired in their ability to participate in the "meet and confer" process by their nonmembership in MCCFA, that some plaintiffs felt pressure to join MCCFA because of this reduced opportunity to participate in the "meet and confer" process, and that free speech contrary to MCCFA positions could potentially be chilled by MCCFA's authority to select "meet and confer" representatives. *Id.*, at A–51 to A–52. "The plaintiffs have not demonstrated," however, "that any faculty member's exercise of free speech has been impaired in practice by virtue of this potential inhibition." *Id.*, at A–52. In short, the District Court found that the only restriction on asserted speech rights was the restriction on the opportunity of nonmembers of MCCFA to participate in "meet and confer" sessions.

do not wish to join MCCFA. By granting MCCFA the right to select the faculty representatives for the "meet and confer" committees and by permitting MCCFA to select only its own members, the court held, PELRA unconstitutionally deprives non-MCCFA instructors of "a fair opportunity to participate in the selection of governance representatives." 571 F. Supp., at 10. The court granted declaratory relief in accordance with its holdings and enjoined MCCFA from selecting "meet and confer" representatives without providing all faculty the fair opportunity that its selection practice had unconstitutionally denied.

Appellees, the State Board, and MCCFA all filed appeals with this Court, invoking jurisdiction under 28 U. S. C. § 1253. The Court summarily affirmed the judgment insofar as the District Court held the "meet and negotiate" provisions of PELRA to be valid. *Knight* v. *Minnesota Community College Faculty Assn.*, 460 U. S. 1048 (1983). The Court thus rejected appellees' argument, based on *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495 (1935), and on *Carter* v. *Carter Coal Co.*, 298 U. S. 238 (1936), that PELRA unconstitutionally delegated legislative authority to private parties. The Court's summary affirmance also rejected the constitutional attack on PELRA's restriction to the exclusive representative of participation in the "meet and negotiate" process.

On March 28, 1983, the Court noted probable jurisdiction in the appeals by the Board and MCCFA. 460 U. S. 1050. Several weeks later, following an election held pursuant to a newly established scheme for selecting "meet and confer" representatives, the three-judge District Court modified its injunction to require a specific voting system for the selection of faculty "meet and confer" representatives.[5] This Court permitted appellants to add to their appeal a challenge to this new relief. 462 U. S. 1104 (1983). We now reverse the District Court's holding that the "meet and confer" provisions of PELRA deprive appellees of their constitutional rights.

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[5] The Board and MCCFA established a new process for selecting "meet and confer" representatives and held the prescribed election before this Court noted probable jurisdiction. The new process allowed each faculty member to nominate candidates, to run for election, and to vote for each vacancy on both state and local committees. For a voter's ballot to be

II

A

Appellees do not and could not claim that they have been unconstitutionally denied access to a public forum. A "meet and confer" session is obviously not a public forum. It is a fundamental principle of First Amendment doctrine, articulated most recently in *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37, 45–46 (1983), that for government property to be a public forum, it must by long tradition or by government designation be open to the public at large for assembly and speech. Minnesota college administration meetings convened to obtain faculty advice on policy questions have neither by long tradition nor by government designation been open for general public participation. The District Court did not so find, 571 F. Supp., at 9, and appellees do not contend otherwise.

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counted, though, the voter had to cast votes for as many candidates as there were slots to be filled. Only MCCFA members ran for the statewide committees. At the local level, several non-MCCFA instructors ran for office, and MCCFA ran slates of candidates at each institution. Only MCCFA members were elected.

Upon appellees' motion for further relief, the District Court ruled that the new selection scheme failed to provide appellees "the opportunity to participate meaningfully in the meet and confer process." App. A–192. The court ordered that new elections be conducted using a cumulative voting system, under which voters could concentrate their multiple votes on a particular candidate, thereby enhancing the possibility that a non-MCCFA candidate would be elected.

Appellants challenge the District Court's modified order of relief separate and apart from its holding that PELRA is unconstitutional as applied. In light of our disposition on the issue of PELRA's constitutionality, we need not address the validity of the District Court's remedy.

The rights at issue in these cases are accordingly wholly unlike those at stake in *Madison Joint School District No. 8* v. *Wisconsin Employment Relations Comm'n*, 429 U. S. 167 (1976). The Court in that case upheld a claim of access to a public forum, applying standard public-forum First Amendment analysis. See *Perry Education Assn.* v. *Perry Local Educators' Assn., supra*, at 45 (citing *Madison Joint School District* as an example of a case involving a "forum generally open to the public" for expressive activity). The school board meetings at issue there were "opened [as] a forum for direct citizen involvement," 429 U. S., at 175, and "public participation [was] permitted," *id.*, at 169. The First Amendment was violated when the meetings were suddenly closed to one segment of the public even though they otherwise remained open for participation by the public at large.[6] These cases, by contrast, involve no selective closure of a generally open forum, and hence any reliance on the *Madison* case would be misplaced.

Indeed, the claim in these cases is not even a claim of access to a *nonpublic* forum, such as the school mail system at issue in *Perry Education Assn.* A private organization there claimed a right of access to government property for use in speaking to potentially willing listeners among a group of private individuals and public officials not acting in an official capacity. The organization claimed no right to have anyone, public or private, attend to its message. See also *United States Postal Service* v. *Greenburgh Civic Assns.*, 453 U. S. 114 (1981) (postal letterbox); *Greer* v. *Spock*, 424 U. S. 828 (1976) (military base); *Lehman* v. *City of Shaker Heights*, 418 U. S. 298 (1974) (advertising space on municipal bus); *Adderley* v. *Florida*, 385 U. S. 39 (1966) (county jail). Appellees here make a claim quite different from those made in the nonpublic-forum cases. They do not contend that certain government property has been closed to them for use in communicating with private individuals or public officials not acting as such who might be willing to listen to them. Rather, they claim an entitlement to a government audience for their views.

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[6] JUSTICE STEVENS' dissent suggests that somehow the Constitution itself opened the school board meeting as a public forum. *Post*, at 319, n. 28. To the extent that the suggestion is that something other than government designation or long tradition can make government property a public forum, it is a radical departure from elementary First Amendment doctrine. JUSTICE STEVENS offers no indication of what he would substitute for the current test.

JUSTICE STEVENS' dissent also states that the First Amendment prohibits "the exclusion of persons from access to the organs of government based on [a] desire to give one side a monopoly in expressing its views." *Ibid.* Presumably, the President and every other public official and governmental body would be required to select the group they listen to on policy questions without regard to viewpoint. The suggestion is discussed at greater length *infra*, at 283–285, but merely to state it is to see that it has shocking implications for our political system wholly unsupported by anything this Court has ever held.

"Meet and confer" sessions are occasions for public employers, acting solely as instrumentalities of the State, to receive policy advice from their professional employees. Minnesota has simply restricted the class of persons to whom it will listen in its making of policy. Thus, appellees' principal claim is that they have a right to force officers of the State acting in an official policymaking capacity to listen to them in a particular formal setting.[7] The nonpublic-forum cases concern government's authority to provide assistance to certain persons in communicating with other persons who would not, as listeners, be acting for the government. As the discussion below makes clear, the claim that government is constitutionally obliged to listen to appellees involves entirely different considerations from those on which resolution of nonpublic-forum cases turn. Hence, the nonpublic-forum cases are largely irrelevant to assessing appellees' novel constitutional claim.[8]

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[7] Even supposing that a state official acting on behalf of the State in a policymaking capacity could raise a First Amendment objection to the State's instructions concerning how he conducted his official activity, there is no such claim in these cases. Moreover, appellees have no standing to raise any such claim on behalf of community college administrators.

The District Court agreed with appellees' claim to the extent that it was limited to faculty participation in governance of institutions of higher education. The court reasoned that "issues in higher education have a special character." 571 F. Supp., at 8. Tradition and public policy support the right of faculty to participate in policymaking in higher education, the court stated, and the "right of expression by faculty members also holds a special place under our Constitution." *Id.*, at 8–9. Because of the "vital concern for academic freedom," the District Court concluded, "when the state compels creation of a representative governance system in higher education and utilizes that forum for ongoing debate and resolution of virtually all issues outside the scope of collective bargaining, it must afford every faculty member a fair opportunity to participate in the selection of governance representatives." *Id.*, at 9–10.

This conclusion is erroneous. Appellees have no constitutional right to force the government to listen to their views. They have no such right as members of the public, as government employees, or as instructors in an institution of higher education.

1

The Constitution does not grant to members of the public generally a right to be heard by public bodies making decisions of policy. In *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U. S. 441 (1915), this Court rejected a claim to such a right founded on the Due Process

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[8] *Police Department of Chicago* v. *Mosley*, 408 U. S. 92 (1972), is an equal protection version of a nonpublic-forum case. The plaintiffs in *Mosley* sought access to government property for use in communicating to potentially willing listeners among a group of private individuals or public officials not acting in an official capacity. It has no more relevance to the claim of appellees in these cases than do the First Amendment nonpublic-forum cases.

Clause of the Fourteenth Amendment. Speaking for the Court, Justice Holmes explained:

> "Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule." *Id.*, at 445.

In *Madison Joint School District No. 8* v. *Wisconsin Employment Relations Comm'n,* which sustained a First Amendment challenge to a restriction on access to a public forum, the Court recognized the soundness of Justice Holmes' reasoning outside the due process context. The Court stated: "Plainly, public bodies may confine their meetings to specified subject matter and may hold nonpublic sessions to transact business." 429 U. S., at 175, n. 8.

Policymaking organs in our system of government have never operated under a constitutional constraint requiring them to afford every interested member of the public an opportunity to present testimony before any policy is adopted. Legislatures throughout the Nation, including Congress, frequently enact bills on which no hearings have been held or on which testimony has been received from only a select group. Executive agencies likewise make policy decisions of widespread application without permitting unrestricted public testimony. Public officials at all levels of government daily make policy decisions based only on the advice they decide they need and choose to hear. To recognize a constitutional right to participate directly in government policymaking would work a revolution in existing government practices.

Not least among the reasons for refusing to recognize such a right is the impossibility of its judicial definition and enforcement. Both federalism and separation-of-powers concerns would be implicated in the massive intrusion into state and federal policymaking that recognition of the claimed right would entail. Moreover, the pragmatic considerations identified by Justice Holmes in *Bi-Metallic Investment Co.* v. *State Board of Equalization, supra*, are as weighty today as they were in 1915. Government makes so many policy decisions affecting so many people that it would likely grind to a halt were policymaking constrained by constitutional requirements on whose voices must be heard. "There must be a limit to individual argument in such matters if government is to go on." *Id.*, at 445. Absent statutory restrictions, the State must be free to consult or not to consult whomever it pleases.

However wise or practicable various levels of public participation in various kinds of policy decisions may be, this Court has never held, and nothing in the Constitution suggests it should hold, that government must provide for such participation. In *Bi-Metallic* the Court rejected due process as a source of an obligation to listen. Nothing in the First Amendment or in this Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues. Indeed, in *Smith* v. *Arkansas State Highway Employees*, 441 U. S. 463, 464–466 (1979), the Court rejected the suggestion. No other constitutional provision has been advanced as a source of such a requirement. Nor, finally, can the structure of government established and approved by the Constitution provide the source. It is inherent in a republican form of government that direct public participation in government policymaking is limited. See The Federalist No. 10 (J. Madison). Disagreement with public policy and disapproval of officials' responsiveness, as Justice Holmes suggested in *Bi-Metallic, supra*, is to be registered principally at the polls.

2

Appellees thus have no constitutional right as members of the public to a government audience for their policy views. As public employees, of course, they have a special interest in public policies relating to their employment. Minnesota's statutory scheme for public-employment labor relations recognizes as much. Appellees' status as public employees, however, gives them no special constitutional right to a voice in the making of policy by their government employer.

In *Smith* v. *Arkansas State Highway Employees*, *supra*, a public employees' union argued that its First Amendment rights were abridged because the public employer required employees' grievances to be filed directly with the employer and refused to recognize the union's communications concerning its members' grievances. The Court rejected the argument.

> "The public employee surely can associate, and speak freely and petition openly, and he is protected by the First Amendment from retaliation for doing so. See *Pickering* v. *Board of Education*, 391 U. S. 563, 574–575 (1968); *Shelton* v. *Tucker*, 364 U. S. 479 (1960). But the First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it." *Id.*, at 465 (footnote omitted).

The Court acknowledged that "[t]he First Amendment protects the right of an individual to speak freely, to advocate ideas, to associate with others, and to petition his government for redress of grievances." *Id.*, at 464. The government had not infringed any of those rights, the Court concluded. "[A]ll that the [government] has done in its challenged conduct is simply to ignore the union. That it is free to do." *Id.*, at 466.

The conduct challenged here is the converse of that challenged in *Smith*. There the government listened only to individual employees and not to the union. Here the government "meets and confers" with the union and not with individual employees. The applicable constitutional principles are identical to those that controlled in *Smith.*[9] When government makes general policy, it is under no greater constitutional obligation to listen to any specially affected class than it is to listen to the public at large.

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The academic setting of the policymaking at issue in these cases does not alter this conclusion. To be sure, there is a strong, if not universal or uniform, tradition of faculty participation in school governance, and there are numerous policy arguments to support such participation. See American Association for Higher Education—National Education Association, Faculty Participation in Academic Governance (1967); Brief for American Association of University Professors as *Amicus Curiae* 3–10. But this Court has never recognized a constitutional right of faculty to participate in policymaking in academic institutions.

In several cases the Court has recognized that infringement of the rights of speech and association guaranteed by the First and Fourteenth Amendments "'in the case of teachers brings the safeguards of those amendments vividly into operation.'" *Shelton* v. *Tucker*, 364 U. S. 479, 487 (1960) (quoting *Wieman* v. *Updegraff*, 344 U. S. 183, 195 (1952) (Frankfurter, J., concurring)). Those cases, however, involved individuals' rights to express their views and to associate with others for communicative purposes. See, *e. g.*, *Keyishian* v. *Board of Regents of University of New York*, 385 U. S. 589 (1967); *Shelton* v. *Tucker, supra; Sweezy* v. *New Hampshire*, 354 U. S. 234 (1957). These rights do not entail any government obligation to listen. *Smith* v. *Arkan-*

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[9] Although an individual employee may have certain due process rights that a union does not have, these cases involve no claimed deprivation of life, liberty, or property without due process.

sas State Highway Employees, 441 U. S. 463 (1979). Even assuming that speech rights guaranteed by the First Amendment take on a special meaning in an academic setting, they do not require government to allow teachers employed by it to participate in institutional policymaking. Faculty involvement in academic governance has much to recommend it as a matter of academic policy, but it finds no basis in the Constitution.

B

Although there is no constitutional right to participate in academic governance, the First Amendment guarantees the right both to speak and to associate. Appellees' speech and associational rights, however, have not been infringed by Minnesota's restriction of participation in "meet and confer" sessions to the faculty's exclusive representative. The State has in no way restrained appellees' freedom to speak on any education-related issue or their freedom to associate or not to associate with whom they please, including the exclusive representative. Nor has the State attempted to suppress any ideas.

It is doubtless true that the unique status of the exclusive representative in the "meet and confer" process amplifies its voice in the policymaking process. But that amplification no more impairs individual instructors' constitutional freedom to speak than the amplification of individual voices impaired the union's freedom to speak in *Smith* v. *Arkansas State Highway Employees*, *supra*. Moreover, the exclusive representative's unique role in "meet and negotiate" sessions amplifies its voice as much as its unique role in "meet and confer" sessions, yet the Court summarily affirmed the District Court's approval of that role in these cases. Amplification of the sort claimed is inherent in government's freedom to choose its advisers. A person's right to speak is not infringed when government simply ignores that person while listening to others.[10]

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[10] JUSTICE STEVENS' discussion of the right to "a *meaningful* opportunity to express one's views" and of First Amendment associational rights is be-

Nor is appellees' right to speak infringed by the ability of MCCFA to "retaliate" for protected speech, as the District Court put it, by refusing to appoint them to the "meet and confer" committees. The State of Minnesota seeks to obtain MCCFA's views on policy questions, and MCCFA has simply chosen representatives who share its views on the issues to be discussed with the State. MCCFA's ability to "retaliate" by not selecting those who dissent from its views no more unconstitutionally inhibits appellees' speech than voters' power to reject a candidate for office inhibits the candidate's speech. See *Branti* v. *Finkel*, 445 U. S. 507, 533 (1980) (POWELL, J., dissenting).

Similarly, appellees' associational freedom has not been impaired. Appellees are free to form whatever advocacy groups they like. They are not required to become members of MCCFA, and they do not challenge the monetary contribution they are required to make to support MCCFA's representation activities.[11] Appellees may well feel some pressure

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side the point. *Post*, at 308–314. Such rights, whatever their scope, entail no government obligation to listen, and that is what is claimed by appellees. *Smith* v. *Arkansas State Highway Employees*, 441 U. S. 463, 464–466 (1979). None of the cases cited by JUSTICE STEVENS even considers, let alone supports, a right to be heard by the government on policy questions.

In particular, *Healy* v. *James*, 408 U. S. 169 (1972), concerns a group's claim of access to a forum to use in communicating among themselves and with other potentially willing listeners. As pointed out *supra*, at 280–283, these cases involve no such claim to a forum. Rather, appellees claim a right to be listened to by persons acting solely in their capacity as representatives of the State. *Healy* is therefore utterly irrelevant to the validity of appellees' claim.

[11] Under PELRA, public employees are not required to join the organization that acts as their exclusive representative. Minn. Stat. § 179.65, subd. 2 (1982). Nonmembers may, however, be required to pay a fair-share fee to the exclusive representative to cover costs related to negotiating on behalf of the entire bargaining unit. *Ibid.* This requirement is not at issue in this lawsuit, although it is subject to certain constitutional constraints. See *Abood* v. *Detroit Board of Education*, 431 U. S. 209, 217–237 (1977) (mandatory contributions valid if for bargaining, administration,

to join the exclusive representative in order to give them the opportunity to serve on the "meet and confer" committees or to give them a voice in the representative's adoption of positions on particular issues. That pressure, however, is no different from the pressure they may feel to join MCCFA because of its unique status in the "meet and negotiate" process, a status the Court has summarily approved. Moreover, the pressure is no different from the pressure to join a majority party that persons in the minority always feel. Such pressure is inherent in our system of government; it does not create an unconstitutional inhibition on associational freedom.[12]

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and grievance activities of exclusive representative but not if for other, ideological activities).

[12] JUSTICE STEVENS quotes certain of the District Court's findings as if to suggest that they undercut our holding. *Post*, at 308. The suggestion is meritless. The finding that "the weight and significance of individual speech interests have been consciously derogated in favor of systematic, official expression," 571 F. Supp. 1, 8 (1982), is merely one way of saying that the State of Minnesota, as a deliberate policy matter, is committed to listening to the exclusive representative on public employer policy questions. Moreover, it is perfectly true, and perfectly unobjectionable, that "the primary mechanism for any significant faculty-administration communication on . . . policy questions," App. to Juris. Statement A–49, is the "meet and confer" process. It is likewise obvious and of no legal consequence that the "meet and confer" process "is the only significant forum for the faculty to resolve virtually every issue outside the scope of mandatory bargaining." 571 F. Supp., at 9.

The last statement quoted by JUSTICE STEVENS draws a general conclusion about PELRA: "This structure effectively blocks any meaningful expression by faculty members who are excluded from the formal process." *Ibid.* Given that it appears in the midst of the District Court's analysis and not with its findings of fact, the statement was probably intended, and in any case is most sensibly read, as a mixed statement of law and fact, depending for its truth on a definition of "meaningful" that must be based on legal principles. However the statement is read, though, appellees have no constitutional right to be heard on policy questions, and their speech and associational freedoms have been wholly unimpaired.

C

Unable to demonstrate an infringement of any First Amendment right, appellees contend that their exclusion from "meet and confer" sessions denies them equal protection of the laws in violation of the Fourteenth Amendment. This final argument is meritless. The interest of appellees that is affected—the interest in a government audience for their policy views—finds no special protection in the Constitution. There being no other reason to invoke heightened scrutiny, the challenged state action "need only rationally further a legitimate state purpose" to be valid under the Equal Protection Clause. *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U. S., at 54. PELRA certainly meets that standard. The State has a legitimate interest in ensuring that its public employers hear one, and only one, voice presenting the majority view of its professional employees on employment-related policy questions, whatever other advice they may receive on those questions. Permitting selection of the "meet and confer" representatives to be made by the exclusive representative, which has its unique status by virtue of majority support within the bargaining unit, is a rational means of serving that interest.

If it is rational for the State to give the exclusive representative a unique role in the "meet and negotiate" process, as the summary affirmance in appellees' appeal in this litigation presupposes, it is rational for the State to do the same in the "meet and confer" process. The goal of reaching agreement makes it imperative for an employer to have before it only one collective view of its employees when "negotiating." See *Abood* v. *Detroit Board of Education*, 431 U. S., at 224.[13]

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[13] *Abood* held that employees may not be compelled to support a union's ideological activities unrelated to collective bargaining. The basis for the holding that associational rights were infringed was the compulsory collection of dues from dissenting employees. 431 U. S., at 232–237. Contrary to the suggestion of JUSTICE STEVENS' dissent, see *post*, at 316, 321–322, *Abood* did not even discuss, let alone adopt, any general bar on "exclusiv-

Similarly, the goal of basing policy decisions on consideration of the majority view of its employees makes it reasonable for an employer to give only the exclusive representative a particular formal setting in which to offer advice on policy. Appellees' equal protection challenge accordingly fails.

III

The District Court erred in holding that appellees had been unconstitutionally denied an opportunity to participate in their public employer's making of policy. Whatever the wisdom of Minnesota's statutory scheme for professional employee consultation on employment-related policy, in academic or other settings, the scheme violates no provision of the Constitution. The judgment of the District Court is therefore

Reversed.

JUSTICE MARSHALL, concurring in the judgment.

I do not agree with the majority's sweeping assertion that no government official is ever constitutionally obliged, before making a decision on a matter of public policy, to afford interested citizens an opportunity to present their views. *Ante*, at 283–285. Nor do I agree with JUSTICE STEVENS that the First Amendment always—or even often—requires that government decisions be made in "an open marketplace of ideas." See *post*, at 300, 314. Rather, I think that the constitutional authority of a government decisionmaker to choose the persons to whom he will and will not listen prior to making a decision varies with the nature of the decision at issue and the institutional environment in which it must be made. Cf. *Healy* v. *James*, 408 U. S. 169, 180 (1972) ("First Amendment rights must always be applied 'in light of the special

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ity" outside the collective-bargaining context. Of course, these cases involve no claim that anyone is being compelled to support MCCFA's activities. See n. 11, *supra*.

characteristics of the . . . environment' in the particular case") (quoting *Tinker* v. *Des Moines Independent School District*, 393 U. S. 503, 506 (1969)). The narrow question presented in these cases is the constitutional validity of a peculiar set of constraints on consultation between administrators and members of the faculties of state colleges; it can be sensibly resolved only by attending to the distinctive characteristics and needs of public institutions of higher education.

We have frequently affirmed that "the intellectual give and take of campus debate" is entitled to constitutional protection. *E. g.*, *Healy* v. *James*, 408 U. S., at 181–182. Accordingly, we have been solicitous of the rights of students in public colleges to organize themselves into voluntary associations, see *id.*, at 180–184; of the rights of student organizations to make use of college facilities, see *Widmar* v. *Vincent*, 454 U. S. 263, 267–270, and n. 5 (1981); and of the rights of faculty members to espouse unpopular ideas or to join controversial organizations without fear of discharge or retaliation, see *Keyishian* v. *Board of Regents of University of New York*, 385 U. S. 589, 601–603, 607–608 (1967); *Shelton* v. *Tucker*, 364 U. S. 479, 485–487 (1960). In an appropriate case, I would be prepared to include within this collection of constitutionally protected avenues of communication a measure of freedom on the part of faculty members (as well as students) to present to college administrators their ideas on matters of importance to the mission of the academic community. Such freedom is essential if all members of the community are to participate meaningfully in the determination of the goals of the institution and the choice of means to achieve them. Such participation is, in turn, essential if our academic institutions are to fulfill their dual responsibility to advance the frontiers of knowledge through unfettered inquiry and debate, see *Sweezy* v. *New Hampshire*, 354 U. S. 234, 250 (1957), and to produce a citizenry willing and able to involve itself in the governance of the polity, see *id.*, at 250–251; see also *Keyishian* v. *Board of Regents*, *supra*, at 603.

In determining whether a given constraint on the ability of faculty members to communicate with administrators runs afoul of the Constitution, it seems to me proper to consider not only the asserted justification but also the source of the constraint. As JUSTICE STEVENS suggests, see *post*, at 300, 313–314, 322–323, there are good reasons to be more suspicious when a state legislature instructs college administrators to listen to some faculty members but not others than when administrators decide on their own to listen to some faculty members but not others. Administrators are more accountable to slighted faculty members than are state legislators.* Moreover, our solicitude for the rights of unpopular members of academic communities and our desire to keep open the channels of communication within those communities, see *supra*, at 293, should not blind us to the fact that, in general, colleges and universities are most likely to fulfill their crucial roles in our society if they are allowed to operate free of outside interference. See *University of California Regents* v. *Bakke*, 438 U. S. 265, 312 (1978) (opinion of POWELL, J.); *Sweezy* v. *New Hampshire*, *supra*, at 262–263 (Frankfurter, J., concurring in result). That insight should prompt us to defer to the judgment of college administrators—persons we presume to be knowledgable and to have the best interests of their institutions at heart—in circumstances in which we

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*Cf. *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U. S. 441, 445 (1915) (contending that property owners in Denver, who were adversely affected by a State Board of Equalization ruling, "are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule"). At least in the context of decisions affecting public colleges and universities, I agree with JUSTICE STEVENS' suggestion that, when the "power" posited by the Court in *Bi-Metallic* becomes too "remote," the First Amendment warrants the establishment of a right on the part of the affected persons to present their views to the decisionmakers, as an alternative check on the choices made.

would not defer to the judgment of government officials who seek to regulate the affairs of the academy.

The difficult tasks of giving shape to these First Amendment rights and of assessing the state interests that might justify their abridgment can, however, be left to another day, because the proofs in these cases do not establish the kind of impairment of the ability of faculty members to communicate with administrators that would, in my view, give rise to constitutional difficulty. As the majority observes, there remains substantial opportunity, outside the formal "meet and confer" sessions, for administrators and faculty members in Minnesota community colleges to exchange ideas on a wide variety of topics. See *ante*, at 276–277, and nn. 3, 4. This is not to say that all faculty members have equal access to the most effective media for communicating with the administration; the findings of the District Court make plain that the representatives of the MCCFA enjoy greater freedom to express their views than appellees. See 571 F. Supp. 1, 8 (1982). But the Constitution does not require college administrators to give "equal time" to all persons competing for their attention. No more can legitimately be expected than that all members of the academic community be afforded a meaningful opportunity to make themselves heard. In my view, appellees have failed to show that the PELRA denies them that opportunity.

For the foregoing reasons, I concur in the judgment of the Court but not its opinion.

JUSTICE BRENNAN, dissenting.

Although I agree with much of JUSTICE STEVENS' dissent, I write separately to explain why, irrespective of other grounds, principles of academic freedom require affirmance of the District Court's holding that the "meet and confer" provisions deprive appellees of their constitutional rights.

It is crucial at the outset to recognize that two related First Amendment interests are at stake here. On the one hand, those faculty members who are barred from participation in "meet and confer" sessions by virtue of their refusal to join MCCFA have a First Amendment right to express their views on important matters of academic governance to college administrators.[1] At the same time, they enjoy a First Amendment right to be free from compelled associations with positions or views that they do not espouse. In my view, the real vice of the Minnesota Public Employment Labor Relations Act (PELRA) is that it impermissibly forces nonunion faculty members to choose between these two rights.

The first right is rooted in our common understanding that the First Amendment safeguards the free exchange of ideas at institutions of higher learning. This Court's decisions acknowledge unequivocally that academic freedom is "a special concern of the First Amendment," *Keyishian* v. *Board of Regents of University of New York*, 385 U. S. 589, 603 (1967), and that protecting the free exchange of ideas within our schools is of profound importance in promoting an open society. See, *e. g.*, *Healy* v. *James*, 408 U. S. 169, 180–181 (1972); *Shelton* v. *Tucker*, 364 U. S. 479, 487 (1960); *Sweezy* v. *New Hampshire*, 354 U. S. 234, 250 (1957). Recognizing that in our society "[t]he classroom is peculiarly the 'marketplace of ideas,'" *Keyishian* v. *Board of Regents*, 385 U. S., at 603, we have not hesitated to strike down laws that effectively inhibit the free discussion of novel or controversial ideas, see, *e. g.*, *ibid.*; *Shelton* v. *Tucker*, *supra*, or that directly prohibit the teaching of unpopular subject matter. *Epperson* v. *Arkansas*, 393 U. S. 97, 107 (1968). This First Amendment freedom to explore novel or controversial ideas in the classroom is closely linked to the freedom of faculty members to express their views to the administration concerning matters of academic governance. If the First Amendment is truly to protect the "free play of the spirit" within our institutions of higher learning, *Shelton* v. *Tucker*, *supra*, at 487, then the faculty at those institutions must be able to participate effectively in the discussion of such matters as, for example, curriculum reform, degree requirements, student affairs, new facilities, and budgetary planning. The freedom to teach without inhibition may be jeopardized just as gravely by a restriction on the faculty's ability to speak out on such matters as by the more direct restrictions struck down in *Keyishian* and in *Epperson*. In my view, therefore, a direct prohibition of some identified faculty group from submitting their views concerning academic policy questions for consideration by college administrators would plainly violate the principles of academic freedom enshrined in the First Amendment.

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[1] In this respect, I agree with JUSTICE MARSHALL's suggestion that the First Amendment protects the freedom of "faculty members . . . to present to college administrators their ideas on matters of importance to the mission of the academic community," *ante*, at 293; I disagree, however, with his view that the sporadic and informal opportunities of nonunion faculty to exchange ideas with college administrators outside the "meet and confer" context provide a sufficient guarantee that this First Amendment freedom has been fully respected. See *infra*, at 298, and n. 2.

The basis of the second right—the right to be free from compelled associations—is found in our conviction that individuals may not be forced to join or support positions or views which they find objectionable on moral, ideological, or personal grounds. See, *e. g.*, *Abood* v. *Detroit Board of Education*, 431 U. S. 209, 234–236 (1977); *Wooley* v. *Maynard*, 430 U. S. 705, 714–715 (1977); *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 642 (1943). Cf. *Elrod* v. *Burns*, 427 U. S. 347, 362–364 (1976) (opinion of BRENNAN, J.). This right is especially worthy of respect in the academic setting, for the denial of associational freedom threatens that cherished spirit of our schools and universities "to inquire, to study and to evaluate," *Sweezy*, *supra*, at 250, which the First Amendment seeks to preserve. Cf. *Keyishian*, *supra; Shelton*, *supra*.

An examination of the record in this case reveals that these two First Amendment freedoms are compromised by Minnesota's statute. As the District Court observed, the formal "meet and confer" sessions in which MCCFA representatives discuss issues of academic governance with college administrators constitute an "important academic forum." 571 F. Supp. 1, 9 (1982). This forum is critical because, as the District Court found, it is "the primary mechanism for any significant faculty-administration communication," App. to Juris. Statement A–49; because "[t]he views of [the] faculty meet and confer committee are considered by administrators to be the official faculty position on matters discussed in meet and confer sessions," *ibid.*, and because the "meet and confer" sessions represent the "exclusive formal process for formulating and communicating a collective faculty position on policy questions," *id.*, at A–50. As might be expected given the centrality and importance of these sessions, many nonunion faculty members view participation in the "meet and confer" process as "essential to their role on the faculty." *Id.*, at A–51. Indeed, if one considers the broad catalog of issues that are commonly addressed during "meet and confer" sessions—curriculum proposals, academic standards, budgetary matters, and so forth—it is easy to see why the excluded faculty members would regard this restriction as a threat to their ability to function as full members of the academic community.[2]

As the District Court also found, however, the ability to participate in this essential and centrally important process is fundamentally "impaired" when a faculty member refuses to join MCCFA. *Ibid.* By restricting participation in the "meet and confer" process to union members, Minnesota has put direct pressure on nonunion faculty members to join MCCFA. See *ibid.* If those faculty members want to remain full members of the academic community, they must abandon their personal or ideological objections to associating with MCCFA. Especially in the academic setting where respect for these associational rights is considered fundamental to the protection of freedom of thought, such associational conformity is far too high a price to exact for the right to express one's views on questions of academic policy.

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[2] Although informal avenues of communication remain open to dissident faculty members, this cannot obscure the critical finding that the "official" view of the faculty is formulated and conveyed to the administration through the "meet and confer" process, from which nonunion faculty members are excluded solely on account of their refusal to join MCCFA. It seems to me plain that these faculty members have a right to participate in a process as vital and important to the life of their academic community as the formal communication to college administrators of faculty positions, and that this right cannot be fully protected by sporadic and informal opportunities to confer with the administration.

Of course, if the "meet and confer" process did not play such a central and important role in formulating academic policy in Minnesota's community colleges or if other avenues of communication provided nonunion faculty a nearly equivalent mechanism for expressing their views, the First Amendment would not be violated, since in those circumstances nonunion faculty members would not be faced with a Hobson's choice between exercising their right to participate in academic policy discussions and preserving their associational rights. Similarly, if the Minnesota statute were more narrowly tailored so that all faculty members, regardless of union affiliation, could participate in the selection of "meet and confer" committees, there would be no encroachment upon associational or free speech interests. Such a narrowly drawn statute would fully serve the State's interest in hearing only from a manageable number of voices and would avoid infringement of the rights of nonunion faculty.

As we have often recognized, the use of an exclusive union representative is permissible in the collective-bargaining context because of the State's compelling interest in reaching an enforceable agreement, an interest that is best served when the State is free to reserve closed bargaining sessions to the designated representative of a union selected by public employees. See *Abood, supra,* at 223–226. See also *Madison Joint School Dist. No. 8* v. *Wisconsin Employment Relations Comm'n,* 429 U. S. 167, 178 (1976) (BRENNAN, J., concurring in judgment). But in the distinctive context of "meet and confer" sessions—which embrace a broad array of sensitive policy matters and which serve only to provide information, not to establish any element of a collective-bargaining agreement—the State's interest in admitting no one other than an exclusive union representative to such sessions is substantially diminished. The views expressed by a union representative will only furnish college administrators with an incomplete and imperfect account of the wide-ranging views of the entire faculty. The *Abood* rationale, therefore, does not justify this statutory restriction on the ability of nonunion faculty members to convey to college administrators their views on matters of importance to the academic community.

Accordingly, I would affirm the judgment of the District Court.

JUSTICE STEVENS, with whom JUSTICE BRENNAN joins in all but Part III, and with whom JUSTICE POWELL joins in all but Part II, dissenting.

The First Amendment provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." Laws enacted by state legislatures are subject to this prohibition. *Gitlow* v. *New York*, 268 U. S. 652 (1925). The question in this case is whether Minnesota's statute granting unions preferential access to the policymaking deliberations of public agencies, while prohibiting comparable access for others, is such a law.

We need not consider whether executives or legislators have any constitutional obligation to listen to unsolicited advice to decide this case. It is inherent in the republican form of government that high officials may choose—in their own wisdom and at their own peril—to listen to some of their constituents and not to others. But the First Amendment does guarantee an open marketplace for ideas—where divergent points of view can freely compete for the attention of those in power and of those to whom the powerful must account. The Minnesota statute places a significant restraint on that free competition, by regulating the communication that may take place between the government and those governed. As the District Court found, the statute gives only one speaker a realistic opportunity to present its views to state officials. All other communication is effectively prohibited, not by reference to the time, place, or manner of communication, or even by reference to the officials' willingness to listen, but rather by reference to the identity of the speaker. The statute is therefore invalid because the First Amendment does not permit any state legislature to grant a single favored speaker an effective monopoly on the opportunity to petition the government.

I

The Minnesota Public Employment Labor Relations Act (PELRA), Minn. Stat. §§ 179.61–179.76 (1982), applies to the State itself, to its political subdivisions, and to its administrative agencies. While this case involves the state community college system, the statutory scheme applies to any public employer that engages in collective bargaining and has policymaking responsibilities in areas beyond its contractual relationships with its employees. It is its unique regulation of the public agencies' process of formulating policy concerning other subjects that makes the statute vulnerable to constitutional attack.

In this appeal, there is no dispute that Minnesota may limit the process of negotiation on the terms and conditions of public employment to the union that represents the employees in a given collective-bargaining unit. This is accomplished by § 179.66, subd. 7, of the statute, which forbids an employer to "meet and negotiate" with anyone except the union's representatives. "Meet and negotiate" is defined as the process of collective bargaining on "terms and conditions of employment," § 179.63, subd. 16, which

> "means the hours of employment, the compensation therefor including fringe benefits except retirement contributions or benefits, and the employer's personnel policies affecting the working conditions of the employees. In the case of professional employees the term does not mean educational policies of a school district. The terms in both cases are subject to the provisions of section

> 179.66 regarding the rights of public employers and the scope of negotiations." § 179.63, subd. 18.

The portion of the statute under challenge here has nothing to do with the process of negotiating labor contracts. The challenged provisions prohibit the exchange of any "view" concerning the policies of the public employer between the employer and any employee except the majority union's representatives. The same portion of the PELRA that limits labor negotiations to the union's representative, also forbids public agencies to "meet and confer" with any employee or group of employees except a representative of the employees' union:

> "*The employer shall not* meet and negotiate or *meet and confer with any employee or group of employees* who are at the time designated as a member or part of an appropriate employee unit *except through the exclusive representative* . . . provided that this subdivision shall not be deemed to prevent the communication to the employer, other than through the exclusive representative, of advice or recommendations by professional employees, when such communication is a part of the employee's work assignment." § 179.66, subd. 7 (emphasis supplied).

The provision exempting individual communications from the otherwise all-encompassing abridgment of speech is limited to communication that "is a part of the employee's work assignment." Thus, a French professor could confer with his employer about Voltaire or Daudet but could not suggest that the football team needs a new coach, that the endowment fund should divest itself of South African investments, that the admissions committee should modify its affirmative-action program, or that the faculty should organize a drive for the March of Dimes.[1]

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[1] The other statutory provision protecting the individual's right to communicate with an employer is also carefully limited to conversations that (a) concern terms and conditions of employment and (b) do not interfere

The breadth of the communication prohibited by this statute is remarkable. The "meet and confer" process in which only the majority union can participate is defined broadly to encompass "the exchange of views and concerns between employers and their respective employees." § 179.63, subd. 15. The statute itself imposes no limit on the subjects that might be covered by the "meet and confer" system; in its application to other agencies, that system could encompass the entire range of public policy questions. Thus, in terms the statute says that a public employee may not exchange any views on virtually any public policy question with his or her employer. Appellants suggest no narrowing construction of these statutory terms, nor would it be appropriate for this Court to attempt in the first instance to construe the statute to mean something other than what it plainly says. The District Court found that the statute has been applied to mean what it says. In the community college program, the District Court found that the "subjects covered by the meet and confer system include new course proposals and other curriculum matters, budgetary planning, development of facilities, student rights and student affairs generally, evaluation of administrators, selection of college presidents, academic accreditation of the community colleges, and other matters." App. to Juris. Statement A-49.

Not only are employees who are not selected to represent the majority union's views disabled from expressing their own opinions to their employers, but the union is guaranteed ample opportunities to do what no one else can. The statute places public employers under an obligation to meet and confer with the majority union's representative at least once every four months. §§ 179.66, subd. 3, 179.73. Moreover,

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with the rights of the exclusive bargaining representative. Thus it is limited to the "meet and negotiate" context not at issue here. It reads as follows:

"Nothing contained in sections 179.61 to 179.76 shall be construed to limit, impair or affect the right of any public employee or his representative to the expression or communication of a view, grievance, complaint or the statute acknowledges that the "meet and confer" process is critical to the process of formulating public policy.[2]

As might be expected, the statutory prohibition has had an adverse impact on conversation and communication between teachers and administrators in the State's community college system. Although the "meet and confer" sessions with the majority union are open to all faculty members, no one can speak without the union's permission.[3] In practice, observers have not been permitted to speak.[4] The statute thus gives the majority union in the system an effective veto over the right of dissident faculty members to communicate their views to the administration.[5] College administrators under-

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opinion on any matter related to the conditions or compensation of public employment or their betterment, so long as the same is not designed to and does not interfere with the full faithful and proper performance of the duties of employment or circumvent the rights of the exclusive representative if there be one . . . ." § 179.65, subd. 1.

[2] "The legislature recognizes that professional employees possess knowledge, expertise, and dedication which is helpful and necessary to the operation and quality of public services and which may assist public employers in developing their policies. It is, therefore, the policy of this state to encourage close cooperation between public employers and professional employees by providing for discussions and the mutual exchange of ideas . . . ." § 179.73, subd. 1.

[3] "Q. Assume the following facts, then, based on your experience as President and also serving on the committees, assume that a person who is not on the Exchange View Committee was present in the room and tried to present his views. Would he be permitted to present his views?

"A. We have within the college a procedure for exchange of views, as we call it, and we have the provision for special witnesses. Prior to each meeting the Chairperson of the faculty and the Chairperson of the Administration can agree on such witnesses. The meetings are totally open so any faculty member may attend the meetings and not speak. But, only special witnesses may speak. So, it takes the agreement between the Chairpersons—faculty and chairperson of the Administration on special witnesses.

"Q. So, either side could block a special witness appearing?

"A. That is correct." App. A–92.

[4] See *id.*, at A–48. See also *id.*, at A–185 to A–186.

[5] "Q. And on the other hand the committee also has the power or at least one side of that committee has the power to make sure nobody from the

stand the PELRA to prohibit them from listening to the views except those of the majority union, and they have acted in accord with that understanding.[6] As a result, much less communication between faculty members and college administrators occurs under the statute because both administrators and teachers fear that if they exchange views, especially when the exchange involves nonunion faculty members, they will be violating the PELRA.[7] Those conversations

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faculty other than the people that are on that committee and those appear as a special witness, is that right?

"A. That's correct." *Id.*, at A–104.

To similar effect, see *id.*, at A–95.

[6] "Q. What's the policy of the Administration with respect to engaging in meet and confer or exchange of view processes with persons other than the Faculty Association?

"A. Well, we are not supposed to do it." *Id.*, at A–79.

"Q. And the Board also recognizes that it must not meet and confer formally with individual teachers who might demand such an opportunity?

"A. Yes.

"Q. And that is because, is it not, that for the Board to do so would violate the Faculty Association's exclusive privilege to meet and negotiate, is that correct?

"A. My understanding is that to do otherwise would violate the law in the collective bargaining.

"Q. Both as to negotiation and as to conferring?

"A. Meet and confer in a formal sense of the word, yes.

"Q. So the State Board, in fact, does not meet and negotiate with any faculty group other than the MCCFA?

"A. That's correct.

"Q. And in fact, on the college campuses the Administration does not—or at least is not supposed to meet and confer or engage in an exchange of views with any group other than the Faculty Association?

"A. In a formal sense, yes." *Id.*, at A–58.

See also *id.*, at A–76 to A–77, A–87, A–162 to A–163.

[7] "Q. And then after . . . January of '71, was an individual free to discuss anything he wanted?

"A. Yes.

"Q. Has that been also true since the adoption of the contract [pursuant to the PELRA] in April of '73?

"A. Well, I think that, technically, the person has been free to do that and the administrator's been free to do that, but I think that practically—

that do still occur often are useless as a practical matter, since the administrator often responds only by saying that the subject must be discussed in a different forum.[8] Thus

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many such situations have disappeared because of the fear on the part of the administrator that they would be meeting and conferring or negotiating with someone other than the exclusive representative, and the problem of defining what's meeting and conferring and what's negotiation, I think has been the basic problem." *Id.*, at A–44 to A–45.

"Q. Since 1973 have you ever felt or have you ever been advised by President Helling not to speak with him?

"A. I have been assiduous in my attempt to avoid placing him in a position where he would have to make that type of judgment.

"Q. Is that based on anything that has been told to you by any college administrator?

"A. No. It's based on what's told to me by the Master Contract." *Id.*, at A–148.

"A. I am not free to speak to my administration relative to curriculum matters. I am not free to speak to my administration relative to personnel matters. I am, in point of fact, not free to speak with my administrators on anything which is covered by the Master Contract . . . .

. . . . .

"Q. Do you understand that the administration intends to enforce the terms of that Contract?

"A. I do not wish to place the administration in the awkward position of having to make that judgment. I believe that I am—no matter how noxious I might find the Master Contract—bound by it because of the law. So I don't run around talking to the administration about things which are forbidden by the Master Contract. I don't want to put them in that position." *Id.*, at A–151 to A–152.

[8] "Q. When you said exchange of views, when people, when faculty members come in and talk to you, and obviously you're not going to show them out and say get out, but you brought this up yourself, you may say there is a more appropriate form *[sic]*. In other words, discuss it, you will listen to them certainly and your response may be there is a more appropriate form *[sic]* for this, is that right?

"A. That is correct.

"Q. From their point of view at least the discussion may not be meaningful because you cannot afford them the remedy they are looking for, is that correct? In other words, they'll have to go to the form *[sic]* that the problem form *[sic]?*

"A. I think I can answer, yes, to that if I understand." *Id.*, at A–104.

the PELRA has substituted a union-controlled process for the formerly free exchange of views that took place between faculty and the administration.[9] In practice, the union has a monopoly on the effective opportunity to present views to the administration on the wide range of subjects covered by the "meet and confer" process.[10]

"Q. And have you ever advised any Plaintiff in this case or any faculty member that they cannot discuss with you any matter that they wish to discuss?

"A. No. The answer would be no. However, once we get into a discussion I may say it's more appropriately discussed in another forum. But, I wouldn't even know how to keep people from discussing something that they would want to discuss.

"Q. Have you ever advised any of your administrators that they cannot meet with faculty members to discuss matters which the faculty member might wish to discuss?

"A. No. However, there we do have clearly a structure and an understanding of where particular items and issues are discussed. . . . But, clearly I have never given any advice to an Administrator not to discuss an issue of importance to a faculty member. But, I do know that they might refer them to an appropriate place and it will be discussed within that place before a decision is made." *Id.*, at A-101.

See also *id.*, at A-62 to A-63, A-152 to A-153.

[9] "Q. And now the free exchange or the free discussion has become an exchange of views in the formal setting, isn't that correct?

"A. I don't think it's correct to consider one completely replacement *[sic]* for the other. It's like different processes. You referred earlier to individual people, that doesn't, you can't compare that with the exchange of view process that takes place now." *Id.*, at A-59.

[10] "Q. Well, these Exchange of View Committees that are established by the contract are the exclusive channels for dealings between the Administration and the faculty on matters that are within the jurisdiction of those committees, is that correct?

"A. I believe so, yes.

. . . . .

"Q. Every subject appropriate for exchange of views between the faculty and Administration will be within the jurisdiction of one of these committees, isn't that correct?

"A. We do not—there are six possible committees. We only have three on our campus and they are the three that I mentioned, General Matters of Curriculum and Fiscal/Personnel. Therefore, we do not talk about mat-

The District Court found that under the statute "the weight and significance of individual speech interests have been consciously derogated in favor of systematic, official expression." 571 F. Supp. 1, 8 (1982). "[The] PELRA has made the formal meet and confer process the primary mechanism for *any significant faculty-administration communication* on such policy questions." App. to Juris. Statement A–49 (emphasis supplied). It concluded that the "meet and confer" process "is the only significant forum for the faculty to resolve virtually every issue outside the scope of mandatory bargaining. *This structure effectively blocks any meaningful expression by faculty members who are excluded from the formal process.*" 571 F. Supp., at 9 (emphasis supplied). These findings may not be set aside unless clearly erroneous, see *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U. S. 844 (1982); *Pullman-Standard* v. *Swint*, 456 U. S. 273 (1982), and in any event are not challenged by appellants or the Court.

II

Both the plain language of the statute and the District Court's findings concerning its actual operation demonstrate that it is a law abridging the freedom of speech. This is true both because it grants unions especially favored positions in communicating with public policymaking bodies and because it curtails the ability of all other members of the public to communicate effectively with those public bodies.

There can be no question but that the First Amendment secures the right of individuals to communicate with their government. And the First Amendment was intended to se-

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ters that fall under the other three committees like Personnel—I forget what the other committees could be, I guess Student Services.

"Q. Okay.

"A. The General Matter, to clarify though, is really a casual, and I guess I should answer yes to your question because in the General Matters Committee anything could be brought up." *Id.*, at A–72 to A–73.

cure something more than an exercise in futility—it guarantees a *meaningful* opportunity to express one's views. For example, this Court has recognized that the right to forward views might become a practical nullity if government prohibited persons from banding together to make their voices heard. Thus, the First Amendment protects freedom of association because it makes the right to express one's views meaningful. See *NAACP* v. *Claiborne Hardware Co.*, 458 U. S. 886, 907–908 (1982); *Citizens Against Rent Control* v. *Berkeley*, 454 U. S. 290, 295–299 (1981); *Bates* v. *Little Rock*, 361 U. S. 516, 522–523 (1960); *NAACP* v. *Alabama*, 357 U. S. 449, 460–461 (1958).[11] Because of the importance of this right to play a *meaningful* part in the "uninhibited, robust, and wide-open" debate envisioned by the First Amendment, *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 270 (1964), the Court has not permitted government to deny associational rights critical to this opportunity unless the abridgment is no broader than necessary to serve a vital state purpose.[12]

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[11] We have also held that collective activity is protected in order to obtain "meaningful" access to the courts, *United Transportation Union* v. *Michigan Bar*, 401 U. S. 576, 585–586 (1971); see *In re Primus*, 436 U. S. 412, 426 (1978); *Mine Workers* v. *Illinois Bar Assn.*, 389 U. S. 217 (1967); *Railroad Trainmen* v. *Virginia ex rel. Virginia Bar*, 377 U. S. 1 (1964), and in order to make meaningful the right to vote and to participate in the political process. See *Anderson* v. *Celebrezze*, 460 U. S. 780, 786–788 (1983); *Brown* v. *Socialist Workers '74 Campaign Committee*, 459 U. S. 87, 91–92 (1982); *Buckley* v. *Valeo*, 424 U. S. 1, 65–66 (1976) *(per curiam)*; *Cousins* v. *Wigoda*, 419 U. S. 477, 487–488 (1975); *Kusper* v. *Pontikes*, 414 U. S. 51, 56–58 (1973); *Williams* v. *Rhodes*, 393 U. S. 23, 38–41 (1968) (opinion of Douglas, J.); *id.*, at 41 (Harlan, J., concurring in result).

[12] See *Brown* v. *Socialist Workers '74 Campaign Committee*, 459 U. S., at 92–93; *In re Primus*, 436 U. S., at 432; *Buckley* v. *Valeo*, 424 U. S., at 64–65; *Cousins* v. *Wigoda*, 419 U. S., at 489; *American Party of Texas* v. *White*, 415 U. S. 767, 780 (1974); *Kusper* v. *Pontikes*, 414 U. S., at 56–58; *NAACP* v. *Button*, 371 U. S. 415, 439 (1963); *Shelton* v. *Tucker*, 364 U. S. 479, 488 (1960); *Bates* v. *Little Rock*, 361 U. S. 516, 524 (1960).

The First Amendment also protects the public employee's right *not* to associate. Just as "the Legislature could not require allegiance to a particular political faith as a condition of public employment," *Illinois State Employees Union, Council 34* v. *Lewis*, 473 F. 2d 561, 570 (CA7 1972), so is it equally clear that the legislature could not require an employee to subscribe to the political tenets of a particular labor union.[13] In *Abood* v. *Detroit Board of Education*, 431 U. S. 209 (1977), we held that nonunion members cannot be compelled to contribute to the partisan political activities of the union which represents them, because that would have the forbidden effect of compelling them to support advocacy with which they do not agree and thereby to infringe their associational rights. See *id.*, at 233–237.[14]

The findings of the District Court in this case indicate that access to the "meet and confer" process is essential if appellees are to be able to express their views effectively on issues involving their colleges. The statute prohibits them from expressing "any view" on issues affecting their colleges to the administration, and as a practical matter it "blocks effectively meaningful expression" by appellees on the public policy issues facing the state agencies which employ them.[15] Moreover, the broad sweep of the plain language of the statute has in fact deterred the exercise of First Amendment rights, since public employees and employers cannot be sure if they may exchange views without violating the statute.[16] It is precisely because such broadly worded statutes inhibit free expression that they have been invalidated even when they are being applied in a constitutional manner.[17]

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[13] The District Court found that this statutory scheme requires appellees to join the union if they are to have any meaningful voice because "the [majority union's] exclusive authority to select the committee representative—regardless of how it is actually exercised—inherently creates a chilling effect on the associational and speech interests of faculty members. The scope of the meet and confer committees reaches many issues that are integral to the professional function of a college professor. If one risks exclusion from these committees by not joining in or speaking out against the [union], it seems self-evident that one's freedom not to join or to so speak out is seriously impaired. This risk of exclusion is inherent in the [union's] sole authority to select the committee members. The actual practice only bears out that the risk of exclusion is a real one." 571 F. Supp. 1, 10 (1982).

[14] See generally *Wooley* v. *Maynard*, 430 U. S. 705, 714–715 (1977); *Stanley* v. *Georgia*, 394 U. S. 557, 565 (1969); *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 642 (1943). See also *Elrod* v. *Burns*, 427 U. S. 347, 355–360 (1976) (plurality opinion).

III

The Court suggests that associational rights are adequately protected because appellees remain free to associate in order to express their views outside of the "meet and confer" process. *Ante*, at 289–290. This claim parallels the one advanced in *Healy* v. *James*, 408 U. S. 169 (1972). There a state university denied a student group access to university facilities. The Court rejected the argument that this exclusion did not impair First Amendment rights since the student group remained free to associate in order to advocate its views off-campus:

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[15] The Court assumes that the statute does not impair the ability of appellees to express their views "outside" the "formal" "meet and confer" context. *Ante*, at 277–278, n. 4. However, there is nothing in the statute that limits its scope to some sort of "formal" context—it prohibits the expression of "any view."

[16] There is evidence that the sweeping language of the PELRA, which has not been given a narrowing construction either by the state courts, the District Court, or appellants, has in fact had a chilling effect on the exchange of ideas. See n. 7, *supra*.

[17] Under our cases the risk of deterring the free exchange of ideas is reason to invalidate the sweeping language contained in the challenged provisions of the PELRA. See *New York* v. *Ferber*, 458 U. S. 747, 768–769 (1982); *Central Hudson Gas & Elec. Corp.* v. *Public Service Comm'n of N. Y.*, 447 U. S. 557, 565, n. 8 (1980); *Ulster County Court* v. *Allen*, 442 U. S. 140, 155 (1979); *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 380 (1977); *Young* v. *American Mini Theatres, Inc.*, 427 U. S. 50, 59–60 (1976); *Gooding* v. *Wilson*, 405 U. S. 518, 521 (1972); *Keyishian* v. *Board of Regents of University of New York*, 385 U. S. 589, 609 (1967); *Dombrowski* v. *Pfister*, 380 U. S. 479, 494 (1965); *NAACP* v. *Button*, 371 U. S., at 432–433.

> "We may concede, as did Mr. Justice Harlan in his opinion for a unanimous Court in *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S., at 461, that the administration 'has taken no direct action . . . to restrict the rights of [petitioners] to associate freely . . . .' But the Constitution's protection is not limited to direct interference with fundamental rights. The requirement in *Patterson* that the NAACP disclose its membership lists was found to be an impermissible, though indirect, infringement of the members' associational rights. Likewise, in this case, the group's possible ability to exist outside the campus community does not ameliorate significantly the disabilities imposed by the President's action. We are not free to disregard the practical realities." *Id.*, at 183.

Just as the denial of access to campus facilities in *Healy* had a critical impact on First Amendment rights, the denial of access to campus administrators in this case has an equally critical impact on the opportunity to be heard. As the District Court found, in reality the "meet and confer" process is the only meaningful chance appellees have to influence public policy. "If some faculty members are excluded from participation and deliberation in the meet and confer process, they are effectively denied any meaningful expression on the issues resolved through that process." 571 F. Supp., at 8. This statute has effectively muted appellees' voices.[18] The

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[18] The Court relies on the District Court's finding in its first opinion in this litigation that college faculty are still able to "informally" express their views to administrators. *Ante*, at 277–278, n. 4. However, the same District Court, in its second opinion which concluded that the PELRA was unconstitutional, found that this opportunity was theoretical at best; in practice the only realistic opportunity to express views was the opportu-

Court's conclusion to the contrary rests only on its willingness "to disregard the practical realities." 408 U. S., at 183.[19]

The Court's analysis is rooted simply in the notion that "[a]ppellees have no constitutional right to force the government to listen to their views." *Ante*, at 283. No claim is made that college administrators do not want to hear what appellees have to say; to the contrary the administrators claim that they are willing to listen to the views of appellees. The problem is that the administrators are statutorily prohibited from listening. Indeed, the Court distinguishes *Healy* by arguing that that case involved a group seeking to communicate with "potentially willing listeners." *Ante*, at 289, n. 10. That is no distinction at all; the college administrators here are potentially willing listeners as well. It is only the

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nity given to the union and the union alone. As noted in the text, the court found that faculty members "are effectively denied any meaningful expression," 571 F. Supp., at 8, and that "[t]his structure effectively blocks any meaningful expression by faculty members who are excluded from the formal process." *Id.*, at 9. The Court tries to dismiss this "as a mixed statement of law and fact," *ante*, at 290, n. 12, but I do not see how a finding that appellees have no realistic opportunity to express their views is anything but a finding of fact. The legal conclusion is drawn by the Court—it takes the position that it makes no difference whether appellees have any realistic chance to express their views. That willingness to ignore practical realities not only overlooks the teaching of *Healy*, but it makes the protection of the First Amendment illusory at best.

[19] One of the "practical realities" the Court overlooks is the fact that the enlargement of the scope of the union's exclusive authority is itself evidence that this statute is an abridgment of appellees' freedom of speech. In seeking the enactment of this legislation the union surely perceived its practical value. It is no accident that in this Court the oral argument in favor of the validity of the statute was presented by an attorney for the union rather than by a public official. The statute is a significant, highly practical means of amplifying the voice of majority unions at the expense of others. If the union did not think that this statute would enhance its ability to influence public policy, at the expense of the abilities of its competitors to do the same, it would hardly have the stake in the statute's validity that it evidently thinks it has.

statute that prevents appellees from communicating with those in charge of public policy.

Moreover, the District Court found that prior to the passage of the challenged statute, appellees were able to participate in the "meet and confer" process.[20] Their former ability to communicate with the administration has been impaired not by the administration's unwillingness to listen, but by the challenged statute. Any realistic appraisal of the effects of such a restriction must lead to the conclusion that this statute has restricted the traditional freedom of speech appellees had once enjoyed. "[T]he capacity of a group or individual 'to participate in the intellectual give and take of campus debate . . . [would be] limited by denial of access to the customary media for communicating with the administration, faculty members, and . . . students.'" *Widmar* v. *Vincent*, 454 U. S. 263, 267–268, n. 5 (1981) (quoting *Healy*, 408 U. S., at 181–182).

In short, by prohibiting the administration from listening to appellees, the PELRA ensures that appellees' speech can have no meaningful impact upon the administration. Appellees do not rely on the government's "obligation" to hear them; they rely only on their right to have a meaningful opportunity to speak. If a public employer does not wish to listen to appellees, that is its privilege, but the First Amendment at least requires that that decision be made in an open marketplace of ideas, rather than under a statutory scheme that does not permit appellees' speech to be considered, no matter how much merit it may contain.[21]

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[20] "Traditionally, the subjects of meet and confer have been resolved through governance systems in which all faculty members have an opportunity to participate. In the present case, governance at community colleges prior to passage of PELRA consisted of faculty senates and committees, selected through elections in which every faculty member was eligible to both vote and seek election." 571 F. Supp., at 8.

[21] The Court finds this proposition "shocking," and concludes that it would destroy the ability of public officials from the President of the United States on down to select whomever it is that he or she wishes to

IV

No one suggests that the Minnesota statute has been narrowly tailored to serve a compelling state interest.[22] The only interest appellants claim the statute serves is in protecting the status of the public employees' exclusive representative.[23] It is now settled law that a public employer may

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consult. *Ante,* at 281, n. 6. The Court is simply mistaken. Nothing I have said implies that public policymakers must listen to any given point of view, much less that they must give all persons individualized notice and opportunity for hearing, which is all that *Bi-Metallic Investment Co.* v. *State Board of Equalization,* 239 U. S. 441 (1915), relied upon by the majority, *ante,* at 283–285, involved. That case did not present, or consider, any First Amendment issue. An analogy much closer to the PELRA than *Bi-Metallic* would be a statute passed by a Democratic legislative majority prohibiting all legislators from consulting with their Republican constituents. Even this Court might balk at such a statute, but it would not offend the rationale of the majority's opinion. If the President, or a college administrator, does not think it worthwhile to consult with appellees, he of course is free to make that decision. The Minnesota statute, in contrast, does not permit that decision to be made. Minnesota has delegated public policymaking to various employers, but at the same time required that those policies be made in a closed environment where citizens are not even given any realistic opportunity to petition those policymakers for redress of grievances, and policymakers are not free to decide whether they wish to consider the views of disfavored speakers.

[22] While the Court denies that the statute has a sufficient effect on free speech to require that it be narrowly tailored to a compelling state interest, it does suggest that the statute can survive a less demanding form of scrutiny in that it is rationally related to the State's "interest in ensuring that its public employers hear one, and only one, voice presenting the majority view of its professional employees . . . ." *Ante,* at 291. However, appellants themselves do not even articulate such an interest. Moreover, as I will explain below, *infra,* at this page and 316, the majority union is constitutionally prohibited from representing the "majority view" with respect to the subjects of the "meet and confer" process, and therefore the factual predicate for the majority's conclusion is erroneous. I will also address, *infra,* at 317–323, the constitutional "legitimacy" of this novel "interest" in ensuring that only one point of view can be expressed on matters of public policy.

[23] Appellants do not even attempt to argue that administrators must be statutorily prohibited from hearing the views of dissident faculty members if they are to run the community college system efficiently. The District

negotiate only with the elected representative of its employees, because it would be impracticable to negotiate simultaneously with rival labor unions. See *Abood* v. *Detroit Board of Education*, 431 U. S., at 224–226.[24] But in *Abood* we explicitly held that exclusivity could not be extended to areas beyond the statutorily mandated subjects of collective bargaining, since such an extension would impair the associational rights of those who do not wish to join the union. See *id.*, at 232–237. Here, the areas subject to the "meet and confer" process are by definition not subjects of collective bargaining. While a public employer cannot contract with more than one union at a time, as the Court points out, it can confer with as many groups as it desires. *Ante*, at 284. The need to conduct collective bargaining with only one employee representative does not justify prohibiting college administrators from conferring with other employees on topics not the subject of collective bargaining. That is the teaching of *Abood*.[25]

Court made no finding to that effect, nor is there anything in the record to support such a finding:

"Q. Now, did this free exchange of views prior to 1973 in anyway interfere with the operation of the college?

"A. From the point of view of administration, I don't think it did." App. A–60.

[24] See also *Railway Employees* v. *Hanson*, 351 U. S. 225 (1956).

[25] *Smith* v. *Arkansas State Highway Employees*, 441 U. S. 463 (1979) *(per curiam)*, on which the majority relies so heavily, *ante*, at 285–288, involved the procedure for processing union grievances, and simply held that a public employer may choose *not* to permit the union to be the spokesman for employees on those matters. That case sheds no light on the legitimacy of *requiring* the majority union to be the exclusive spokesman on political issues. The total absence of judicial support for the Court's holding explains why it relies instead on somewhat extravagant references to the practice of legislatures throughout the Nation, a concern about "a revolution in existing government practices," and a fear that government "would likely grind to a halt" if this statute were not upheld. *Ante*, at 284–285. Yet the Court fails to identify even one statute, state or federal, which has defined access to a policymaking forum on the basis of the point of view of

There is a simple, but fundamental, reason why the state interest in exclusivity cannot sustain this statute. That interest creates a preference for the views of majority unions which itself infringes the principles of the First Amendment. In *Police Department of Chicago* v. *Mosley*, 408 U. S. 92 (1972), the Court considered the constitutionality of a Chicago ordinance that granted labor unions access to a narrowly defined forum and denied such access to all other speakers. The forum in that case was the area "within 150 feet of any primary or secondary school building while the school is in session" and for one-half hour before and after school sessions, *id.*, at 92–93; the method of communication was peaceful picketing. Unions, but no one else, were allowed access to that narrow forum. The Court unanimously held the ordinance unconstitutional. After pointing out that the ordinance allowed peaceful picketing on the subject of a school's labor-management dispute, but prohibited all other peaceful picketing, the Court continued:

> "Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say." *Id.*, at 96 (footnote omitted).[26]

We have consistently adhered to the principle that government must "afford all points of view an equal opportunity to

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the speaker. The closest analogues that I have found are the cases I discuss above.

[26] See also *Grayned* v. *City of Rockford*, 408 U. S. 104, 107 (1972).

be heard."[27] The majority claims that this principle does not apply to closed proceedings not open to any form of public access. *Ante*, at 280–283. In fact, however, the "meet and confer" sessions are open to the public and are held in public places. Moreover, the State permits participation by the union's representatives but no others. When a State permits some speakers but not others access to a forum for communication, it must justify its exclusions as viewpoint-neutral. See *Widmar* v. *Vincent*, 454 U. S., at 267–268; *Madison Joint School District No. 8* v. *Wisconsin Employment Relations Comm'n*, 429 U. S. 167, 175, and n. 8 (1976); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546, 555–559 (1975). Surely that principle cannot be avoided by the simple expedient of using the speaker's point of view as the criterion for defining the scope of access to a publicly sponsored forum. Indeed, the case on which the majority principally relies, *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37 (1983), states that government may not restrict access to channels of communication as an attempt "to discourage one viewpoint and advance another." *Id.*, at 49.

Here, by giving the union exclusive rights with respect to the primary avenue for communication with college administration, the Minnesota statutory scheme plainly advances the union's viewpoint at the expense of all others. The District Court found that the PELRA "consciously" derogated the weight of individual speech interests in favor of the majority union's interests. The controlling authority is therefore *Madison Joint School District No. 8* v. *Wisconsin Employment Relations Comm'n*, *supra*. We wrote:

> "Regardless of the extent to which true contract negotiations between a public body and its employees may be

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[27] See *Widmar* v. *Vincent*, 454 U. S. 263 (1981); *Consolidated Edison Co.* v. *Public Service Comm'n of N. Y.*, 447 U. S. 530, 537–538 (1980); *Carey* v. *Brown*, 447 U. S. 455 (1980); *Erznoznik* v. *City of Jacksonville*, 422 U. S. 205, 209–212 (1975).

> regulated—an issue we need not consider at this time—the participation in public discussion of public business cannot be confined to one category of interested individuals. To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees. Whatever its duties as an employer, when the board sits in public meetings to conduct public business and hear the views of citizens, it may not be required to discriminate between speakers on the basis of their employment, or the content of their speech. See *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92, 96 (1972)." *Id.*, at 175–176 (footnotes omitted).[28]

This statute gives the union the same "monopoly in expressing its views to the government" that we condemned in the *Madison Joint School District* case. The Minnesota "meet and confer" sessions create, in reality, an exclusive method for communication with government, and permit only one point of view to be expressed. The resultant insulation of public policy from exposure to the full range of views is that to which the constitutional ban on viewpoint discrimination is addressed. The views of all have the right to be considered on their merits, rather than to be excluded by statutory prohibition. It is one thing to say, as the majority does, that the government may decline to listen to those whose views it finds unhelpful; it is quite another to say that those views need not be given even a fair chance to compete for the attention of government.

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[28] The Court distinguishes *Madison* by arguing that there the forum—a school board meeting—was open to the public. *Ante*, at 281. That reasoning is tautological—the forum was not open to public employees, who were required to present their grievances through the collective-bargaining process. Thus the "forum" in that case was not an "open" one as far as the plaintiffs were concerned, for the school board had "restricted the class of persons to whom it will listen in its making of policy," *ante*, at 282—the school board did not want to hear from its employees, whom the board thought should be heard only through their union. In *Madison* it was the Constitution that "opened" the forum to teachers; specifically it was the First Amendment that prohibited the exclusion of persons from access to the organs of government based on the school board's desire to give one side a monopoly in expressing its views. Moreover, as the cases cited above indicate, even with respect to "forums" not generally opened to the public, government may not limit access to those forums based on a desire to favor one viewpoint at the expense of another. Finally, to the extent that the Court relies on a "tradition" of openness as a basis for distinguishing *Madison*, *ante*, at 280, as noted above, the District Court found that traditionally appellees had been able to participate in the "meet and confer" process prior to the passage of the PELRA. See also *supra*, at 314.

It is instructive to contrast this case with *Perry Education Assn.* v. *Perry Local Educators' Assn.*, 460 U. S. 37 (1983). In that case the Court upheld a school board's contractual agreement allowing the union representing its teachers to make use of the school mail system in connection with the discharge of the union's exclusive representative duties, without providing equal access to rival unions. That preferential treatment of the union was justified by reference to the collective-bargaining process. It was thought necessary to facilitate communication between the union and the teachers because of the majority union's exclusive responsibility for negotiation and administration of the collective-bargaining agreement.

> "We observe that providing exclusive access to recognized bargaining representatives is a permissible labor practice in the public sector. We have previously noted that the 'designation of a union as exclusive representative carries with it great responsibilities. The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones.' Moreover, exclusion of a rival union may reasonably be considered a means of insuring labor peace within the schools. The policy 'serves to prevent the District's schools from becoming a battlefield for inter-union squabbles.'" *Id.*, at 51–52 (footnotes and citations omitted).

After recognizing that the right of access to the mail system was accorded to the union "acting as the representative of the teachers," the Court expressly noted that the case did not involve "a grant of access for unlimited purposes." *Id.*, at 53, n. 13. It also noted that there was no showing that the challenged system substantially disadvantaged the ability of other speakers to communicate their messages. *Id.*, at 53–54.

The case the Court decides today involves preferential treatment of the union as a participant in discussions and debates that lead to the formulation of policy not embraced within its collective-bargaining responsibilities. The "meet and confer" process is statutorily defined to be exclusive of the collective-bargaining process which—as *Abood* squarely holds—is the *only* context in which the union can claim a right to exclusive representation of all employees. The collective-bargaining justifications relied upon in *Perry* are entirely absent when, as here, the union has no right—let alone an exclusive right—to act on behalf of other persons.[29] In short, "exclusivity cannot constitutionally be used to muzzle a public employee who, like any other citizen, might wish to express his view about governmental decisions concerning labor relations . . . ." *Abood*, 431 U. S., at 230. The practical effect of the statutory prohibition on meeting and conferring with anyone but the exclusive representative is to create exactly the sort of "muzzle" condemned by *Abood*.

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[29] The distinction between the exclusive right to represent employees in connection with bargainable issues and a union's desire to speak for the employees on policy questions was plainly identified in *Abood*. After explaining why even nonmembers could be compelled to share the costs of union representation in the traditional negotiating area, the Court explained why that right did not extend into the policy area:

"Equally clear is the proposition that a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment. The appellants argue that they fall within the protection of these cases because they have been prohibited, not from actively associating, but rather from refusing to associate. They specifically argue that they may constitutionally prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative. We have concluded that this argument is a meritorious one." 431 U. S., at 234 (citations omitted).

The First Amendment favors unabridged communication among members of a free society—including communication between employer and employee. The process of collective bargaining requires that a limited exception to that general principle be recognized, but until today we have not tolerated any broadening of that exception beyond the collective-bargaining process. The effect of the Minnesota statute is to make the union the only authorized spokesman for all employees on political matters as well as contractual matters. In my opinion, such state-sponsored orthodoxy is plainly impermissible. The Court, however, relies on a newly found state interest in promoting conformity—the "interest in ensuring that its public employers hear one, and only one, voice presenting the majority view of its professional employees on employment-related policy questions, whatever other advice they may receive on those questions." *Ante*, at 291. The notion that there is a state interest in fostering a private monopoly on any form of communication is at war with the principle that "the desire to favor one form of speech over all others" is not merely trivial; it "is illegitimate." *Carey* v. *Brown*, 447 U. S. 455, 468 (1980).

As I noted at the outset, we are concerned with the constitutionality of a law enacted by the legislature. That law requires all executives administering the community college system—as well as all other public employers—to adhere to the specific "meet and confer" process when formulating public policy. The invalidity of such a law need not impair the discretion exercised by individual public administrators with regard to the identity of the persons from whom, or the time, place, and manner in which, they will accept advice concerning their official conduct. But for the State to preclude the exercise of that discretion—to say that the ideas of all save the majority union may not compete on their merits—is to impose the kind of restraint on the free exchange of ideas that the First Amendment does not tolerate.

Because I am convinced that the statutorily mandated exclusive "meet and confer" process is constitutionally intolerable, I respectfully dissent.

COLORADO *v.* NUNEZ

CERTIORARI TO THE SUPREME COURT OF COLORADO

No. 82–1845. Argued January 17, 1984—Decided February 21, 1984

Certiorari dismissed. Reported below: 658 P. 2d 879.

Steven L. Bernard argued the cause for petitioner. With him on the brief was *James F. Smith.*

Kenneth H. Stern argued the cause and filed a brief for respondent.*

PER CURIAM.

The writ is dismissed as improvidently granted, it appearing that the judgment of the court below rested on independent and adequate state grounds.

JUSTICE WHITE, with whom THE CHIEF JUSTICE and JUSTICE O'CONNOR join, concurring.

The Court today concludes that the Colorado Supreme Court relied on independent and adequate state grounds when it affirmed the trial court's decision to suppress a quantity of heroin seized during a search of respondent Nunez' house following the State's refusal to disclose the identity of a confidential informant on which the Denver Police Department had relied to establish probable cause for the search. I write not to challenge the Court's determination that the judgment under review rests on independent and adequate state grounds, but to make clear that neither the Federal Constitution nor any decision of this Court requires the result reached by the Colorado Supreme Court.

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*Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Lee, Assistant Attorney General Trott, Deputy Solicitor General Frey,* and *David A. Strauss;* and for the Colorado District Attorneys Council by *Brooke Wunnike.*

Burt Neuborne and *Charles Sims* filed a brief for the American Civil Liberties Union as *amicus curiae.*

Before the commencement of his trial on a charge of possession of a controlled substance, Nunez filed a motion to suppress most of the evidence against him on the ground, among others, that the facially valid warrant authorizing the search of his home was not supported by probable cause. In a companion motion, Nunez sought to facilitate his challenge to the legality of the search and his defense on the merits by obtaining disclosure of the names, addresses, and telephone numbers of all informants who had provided evidence against him. The trial court held a hearing at which Nunez gave testimony at odds with the affidavit supporting the search warrant and his attorney gave contradictory signals concerning whether the conduct of the affiant or the informant was at issue. See App. 31–32, 34, 36, 38–39. The court concluded that Nunez had made a sufficient "initial showing that the informant will provide information essential to the merits of his suppression ruling." *People* v. *Bueno*, 646 P. 2d 931, 935–936 (Colo. 1982). It also found that Nunez had shown a reasonable basis in fact to believe that the informant was a likely source of relevant and helpful evidence on the question of guilt or innocence. App. 92. When the State refused to comply with its order to disclose the informant's identity, the trial court suppressed the evidence seized pursuant to the search warrant. *Id.*, at 93.

The State took an interlocutory appeal to the Colorado Supreme Court, which affirmed the trial court's judgment solely on the ground that disclosure of the informant's identity was essential to Nunez' motion to suppress. 658 P. 2d 879 (1983). The State argued strenuously that "an accused must question the conduct of the police in constructing the warrant before he may request the court to order the prosecution to reveal the informant's identity." App. 107. In its view, "a court, after a proper allegation by the accused that brings the *affiant's* credibility into issue, may order disclosure of the informant's identity," but "[t]here must be an attack upon the *affiant's* credibility before the informant can be disclosed." *Id.*, at 103 (emphasis in original).

Although the State cited two federal cases recognizing an informant's privilege, its distinction between situations where the affiant's credibility is attacked and those where only the informant's credibility is questioned rested largely on state law. The Colorado Supreme Court responded in kind, concluding that the State's contention misapprehended its holding in *People* v. *Dailey*, 639 P. 2d 1068 (1982):

> "*Dailey* recognized that errors in an affidavit for a search warrant can result 'from the informant's perjury or reckless disregard for the truth, or from the negligence or good faith mistake of either the officer or the informant.' 639 P. 2d at 1075. When, following a veracity hearing, the probability of one of those kinds of error has been found, the election of remedies or sanctions is left to the discretion of the district court. The necessary foundation for the court's exercise of discretion in ordering disclosure is a showing of a reasonable basis in fact to question the accuracy of *the informant's recitals*." 658 P. 2d, at 881 (emphasis added).

This holding, I believe, confers on trial courts in Colorado discretion to do far more than the Federal Constitution minimally requires.

"[I]n the exercise of its power to formulate evidentiary rules for federal criminal cases," this Court "has consistently declined to hold that an informer's identity need always be disclosed in a federal criminal trial, let alone in a preliminary hearing to determine probable cause for an arrest or search." *McCray* v. *Illinois*, 386 U. S. 300, 312 (1967). See *Roviaro* v. *United States*, 353 U. S. 53 (1957). Nothing in the Federal Constitution, we held in *McCray*, requires a State "to abolish the informer's privilege from its law of evidence, and to . . . disclos[e] . . . the informer's identity in every such preliminary hearing where it appears that the officers made the arrest or search in reliance upon facts supplied by an informer they had reason to trust." 386 U. S., at 312.

We have, to be sure, recently concluded that the Fourth and Fourteenth Amendments entitle a defendant to a veracity hearing if he makes a substantial preliminary showing that an affiant knowingly and intentionally, or with reckless disregard for the truth, included in a warrant affidavit a false statement necessary to the finding of probable cause. *Franks* v. *Delaware*, 438 U. S. 154 (1978). But in so doing we emphasized that "[t]he deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant." *Id.*, at 171. The decision in *Franks* neither required nor contemplated routine disclosure of informants' identities, and we took care to avoid deciding or predetermining "the difficult question whether a reviewing court must ever require the revelation of the identity of an informant once a substantial preliminary showing of falsity has been made." *Id.*, at 170.

In *People* v. *Dailey*, *supra*, the state-court decision on which the challenged judgment rests, the Colorado Supreme Court clearly recognized the limits of the rights conferred by the Fourth and Fourteenth Amendments. *Id.*, at 1074. It concluded, however, that *Franks* established only the federal constitutional standard and held that the State Constitution entitles defendants to challenge the informant's veracity and in appropriate circumstances to have his identity disclosed for that purpose. Although this case would be resolved differently under federal law, see *McCray* v. *Illinois*, *supra*, at 306–309, I agree that the challenged judgment rests solely on state-law grounds and that this Court lacks jurisdiction to review it.

JUSTICE STEVENS, concurring.

In view of the growing public interest in the magnitude of our workload,[1] I have on occasion taken note of some of the ways in which the present Court makes use of its resources. Several years ago, I expressed concern about the purely advisory character of individual opinions dissenting from orders denying petitions for certiorari. See *Singleton* v. *Commissioner*, 439 U. S. 940, 944–945 (1978) (opinion of STEVENS, J.). More recently I have noted that the Court is prone to grant certiorari in cases that do not merit our attention. See *Watt* v. *Alaska*, 451 U. S. 259, 273–276 (1981) (STEVENS, J., concurring); see also *Watt* v. *Western Nuclear, Inc.*, 462 U. S. 36, 72–73 (1983) (STEVENS, J., dissenting).[2] Last Term, in *South Dakota* v. *Neville*, 459 U. S. 553 (1983), and *Michigan* v. *Long*, 463 U. S. 1032 (1983), the Court decided to enlarge its power to review state-court decisions. I dissented from those novel assertions of appellate jurisdiction in part because I was concerned about the undesirability of the rendition of purely advisory opinions by this Court. See *id.*, at 1065 (STEVENS, J., dissenting); 459 U. S., at 566 (STEVENS, J., dissenting); see also 463 U. S., at 1054 (BLACKMUN, J., concurring in part and in judgment in *Michigan* v. *Long*) (noting "an increased danger of advisory opinions in the Court's new approach").

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[1] See, *e. g.*, Coleman, The Supreme Court of the United States: Managing its Caseload to Achieve its Constitutional Purposes, 52 Fordham L. Rev. 1 (1983); Note, Of High Designs: A Compendium of Proposals to Reduce the Workload of the Supreme Court, 97 Harv. L. Rev. 307 (1983).

Today JUSTICE WHITE "agree[s] that the challenged judgment rests solely on state-law grounds and that this Court lacks jurisdiction to review it." *Ante*, at 327. He nevertheless provides us with an advisory opinion, in which THE CHIEF JUSTICE and JUSTICE O'CONNOR join, concerning the merits of the case. We of course have jurisdiction to determine our jurisdiction over this case, but once we agree that we lack jurisdiction, this case no more provides a vehicle for deciding the question upon which three Justices now volunteer an opinion than if the petition for a writ of certiorari had never been filed. I, of course, fully respect their right to their opinions concerning that question, just as I respect other scholars who disagree with the wisdom of the choice made in *Hayburn's Case*, 2 Dall. 409 (1792). I merely note that today's advisory opinion is consistent with the Court's emerging tendency to enlarge its own involvement in litigation conducted by state courts. This tendency feeds on itself, for it can only encourage litigants—particularly institutional litigants—to file even more petitions for certiorari in the hope of obtaining, if not review and reversal, at least an opinion by a number of Supreme Court Justices in support of their position. In light of the increasing flood of certiorari petitions, today's advisory opinion provides further support for concluding that this situation "will very likely progressively worsen."[3]

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[2] See generally Stevens, Some Thoughts on Judicial Restraint, 66 Judicature 177, 180 (1982).

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[3] White, Challenges for the U. S. Supreme Court and the Bar: Contemporary Reflections, 51 Antitrust L. J. 275, 280 (1982).

DICKMAN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 82-1041. Argued November 1, 1983—Decided February 22, 1984

Section 2501(a)(1) of the Internal Revenue Code of 1954 imposes a tax upon "the transfer of property by gift." Section 2511(a) provides that such tax shall apply whether "the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible." Petitioner wife and her husband, now deceased, made substantial interest-free demand loans to their son and a closely held family corporation. The Commissioner of Internal Revenue determined that the loans resulted in taxable gifts to the extent of the value of the use of the loaned funds, and assessed gift tax deficiencies. Petitioner wife and petitioner personal representative of her husband sought redetermination of the deficiencies in the Tax Court, which held that the loans were not subject to the gift tax. The Court of Appeals reversed.

Held: The loans in question resulted in taxable gifts of the reasonable value of the use of the money lent. Pp. 333–344.

(a) The language of §§ 2501(a)(1) and 2511(a) is clear and admits of only one reasonable interpretation: transfers of property by gift, by whatever means effected, are subject to the federal gift tax. The gift tax was designed to encompass all transfers of property and property *rights* having significant value. Pp. 333–335.

(b) The interest-free loan of funds is a "transfer of property by gift" within the contemplation of the Code. The transfer of cash, interest-free and repayable on demand, is a grant of the use of valuable property. And the right to use the money without charge is a valuable interest in the money lent, although the value of such interest may be reduced by virtue of its demand status. Pp. 335–338.

(c) Failure to impose the gift tax on interest-free loans would seriously undermine Congress' goal in enacting the gift tax as a protection against income tax avoidance by the transferor and as a supplement to the estate tax. Pp. 338–339.

(d) Subjecting interest-free loans to the gift tax does not impose upon the transferor a duty to invest profitably, but rather merely recognizes that certain tax consequences flow from a decision to make "a transfer of property by gift." Pp. 339–340.

(e) There is no merit to petitioners' contention that imposing a gift tax on interest-free loans could result in imposing the tax on routine neighborly or familial gifts, thus intruding into cherished zones of privacy. Any such administrative problems are rendered illusory by the generous exclusions, exceptions, and credits provided by the Code for gifts to both family members and others. Pp. 340–342.

(f) Assuming, *arguendo*, that the Commissioner's present position represents a departure from prior administrative practice, he may, nevertheless, change an earlier interpretation of the law, even if such a change is made retroactive in effect, and even though a taxpayer may have relied to his detriment upon the Commissioner's prior position. Pp. 342–343.

690 F. 2d 812, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, BLACKMUN, STEVENS, and O'CONNOR, JJ., joined. POWELL, J., filed a dissenting opinion, in which REHNQUIST, J., joined, *post*, p. 345.

Frank P. Riggs argued the cause for petitioners. With him on the briefs were *Guy S. Emerich, Vester T. Hughes, Jr., M. David Bryant, Jr.*, and *Kathryn G. Henkel.*

Deputy Solicitor General Wallace argued the cause for respondent. With him on the brief were *Solicitor General Lee, Assistant Attorney General Archer, Harriet S. Shapiro, Michael L. Paup, Jonathan S. Cohen,* and *Farley P. Katz.**

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to resolve a conflict among the Circuits as to whether intrafamily, interest-free demand loans result in taxable gifts of the value of the use of the money lent.

I

A

Paul and Esther Dickman were husband and wife; Lyle Dickman was their son. Paul, Esther, Lyle, and Lyle's wife and children were the owners of Artesian Farm, Inc. (Artesian), a closely held Florida corporation. Between 1971 and 1976, Paul and Esther loaned substantial sums to Lyle and Artesian. Over this 5-year interval, the outstanding balances for the loans from Paul to Lyle varied from $144,715 to $342,915; with regard to Paul's loans to Artesian, the outstanding balances ranged from $207,875 to $669,733. During the same period, Esther loaned $226,130 to Lyle and $68,651 to Artesian. With two exceptions, all the loans were evidenced by demand notes bearing no interest.[1]

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*Briefs of *amici curiae* urging reversal were filed for D'Ancona & Pflaum by *Byron S. Miller* and *Alan L. Reinstein;* and for Jones, Day, Reavis & Pogue by *Erwin N. Griswold.*

Paul Dickman died in 1976, leaving a gross estate for federal estate tax purposes of $3,464,011. The Commissioner of Internal Revenue audited Paul Dickman's estate and determined that the loans to Lyle and Artesian resulted in taxable gifts to the extent of the value of the use of the loaned funds.[2] The Commissioner then issued statutory notices of gift tax deficiency both to Paul Dickman's estate and to Esther Dickman.[3]

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[1] One exception was a loan made to Lyle on "open account" and payable on demand; the parties have agreed that the gift tax consequences of this "open account" loan are identical to those of the loans evidenced by the demand notes. 41 TCM 620, 623, n. 4 (1980), ¶80,575 P-H Memo TC, at 2427, n. 4. The other exception was a loan made to Artesian and memorialized by a no-interest note having a term of 10 years, the characterization of which has been a matter of dispute. Although the Tax Court held that this loan to Artesian was in substance a demand loan, *id.*, at 624, ¶80,575 P-H Memo TC, at 2428, the Court of Appeals declined to reach the issue, suggesting that the Tax Court consider the valuation consequences of the loan's characterization on remand. 690 F. 2d 812, 814, n. 3 (CA11 1982). For present purposes, we shall refer to all the loans from Paul and Esther Dickman to Lyle and Artesian as demand loans.

[2] In valuing the gifts, the Commissioner multiplied the loan balances outstanding at the end of each taxable quarter by interest rates ranging from six percent to nine percent per annum. These interest rates were taken from § 6621 of the Internal Revenue Code of 1954, 26 U. S. C. § 6621, made applicable by Code § 6601 to underpayments of tax.

[3] The Commissioner asserted a $42,212.91 deficiency against Paul Dickman's estate and a $41,109.78 deficiency against Esther Dickman.

Esther Dickman and the estate, petitioners here, sought redetermination of the deficiencies in the Tax Court. Reaffirming its earlier decision in *Crown* v. *Commissioner*, 67 T. C. 1060 (1977), aff'd, 585 F. 2d 234 (CA7 1978), the Tax Court concluded that intrafamily, interest-free demand loans do not result in taxable gifts. 41 TCM 620, 623 (1980), ¶80,575 P-H Memo TC, at 2428. Because the Tax Court determined that all the loans to Lyle and Artesian were made payable on demand, it held that the loans were not subject to the federal gift tax. *Id.*, at 624, ¶80,575 P-H Memo TC, at 2428.

B

The United States Court of Appeals for the Eleventh Circuit reversed, holding that gratuitous interest-free demand loans give rise to gift tax liability. 690 F. 2d 812, 819 (1982). Reviewing the language and history of the gift tax provisions of the Internal Revenue Code of 1954 (Code), 26 U. S. C. §2501 *et seq.*, the Court of Appeals concluded that Congress intended the gift tax to have the broadest and most comprehensive coverage possible. The court reasoned that the making of an interest-free demand loan constitutes a "transfer of property by gift" within the meaning of 26 U. S. C. §2501(a)(1), and accordingly is subject to the gift tax provisions of the Code. In so holding, the Court of Appeals squarely rejected the contrary position adopted by the United States Court of Appeals for the Seventh Circuit in *Crown* v. *Commissioner*, 585 F. 2d 234 (1978). We granted certiorari to resolve this conflict, 459 U. S. 1199 (1983); we affirm.

II

A

The statutory language of the federal gift tax provisions purports to reach any gratuitous transfer of any interest in property. Section 2501(a)(1) of the Code imposes a tax upon "the transfer of property by gift." Section 2511(a) highlights the broad sweep of the tax imposed by § 2501, providing in pertinent part:

> "Subject to the limitations contained in this chapter, the tax imposed by section 2501 shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible . . . ."

The language of these statutes is clear and admits of but one reasonable interpretation: transfers of property by gift, by whatever means effected, are subject to the federal gift tax.

The Committee Reports accompanying the Revenue Act of 1932, ch. 209, 47 Stat. 169, which established the present scheme of federal gift taxation, make plain that Congress intended the gift tax statute to reach all gratuitous transfers of any valuable interest in property. Among other things, these Reports state:

> "The terms 'property,' 'transfer,' 'gift,' and 'indirectly' are used in the broadest and most comprehensive sense; the term 'property' reaching every species of right or interest protected by law and having an exchangeable value.
>
> "The words 'transfer . . . by gift' and 'whether . . . direct or indirect' are designed to cover and comprehend all transactions . . . whereby, and to the extent . . . that, property or a property right is donatively passed to or conferred upon another, regardless of the means or the device employed in its accomplishment." H. R. Rep. No. 708, 72d Cong., 1st Sess., 27–28 (1932); S. Rep. No. 665, 72d Cong., 1st Sess., 39 (1932).

The plain language of the statute reflects this legislative history; the gift tax was designed to encompass all transfers of property and property *rights* having significant value.[4]

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[4] The comprehensive scope of the gift tax, reflected by its statutory language and legislative history, is analogous to that of § 61 of the Code, 26 U. S. C. § 61, which defines gross income as "all income from whatever

On several prior occasions, this Court has acknowledged the expansive sweep of the gift tax provisions. In *Commissioner* v. *Wemyss*, 324 U. S. 303, 306 (1945), the Court explained that

> "Congress intended to use the term 'gifts' in its broadest and most comprehensive sense . . . [in order] to hit all the protean arrangements which the wit of man can devise that are not business transactions within the meaning of ordinary speech."

The Court has also noted that the language of the gift tax statute "is broad enough to include property, however conceptual or contingent," *Smith* v. *Shaughnessy*, 318 U. S. 176, 180 (1943), so as "to reach every kind and type of transfer by gift," *Robinette* v. *Helvering*, 318 U. S. 184, 187 (1943). Thus, the decisions of this Court reinforce the view that the gift tax should be applied broadly to effectuate the clear intent of Congress.

B

In asserting that interest-free demand loans give rise to taxable gifts, the Commissioner does not seek to impose the gift tax upon the principal amount of the loan, but only upon the reasonable value of the use of the money lent. The taxable gift that assertedly results from an interest-free demand loan is the value of receiving and using the money without incurring a corresponding obligation to pay interest along with the loan's repayment.[5] Is such a gratuitous transfer of the

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source derived." Section 61 has long been interpreted to include all forms of income except those specifically excluded from its reach. See, *e. g.*, *Commissioner* v. *Glenshaw Glass Co.*, 348 U. S. 426 (1955). Similarly, the gift tax applies to any "transfer of property by gift," Code § 2501(a)(1), "[s]ubject to the limitations contained in this chapter," Code § 2511(a). Accordingly, absent an express exclusion from its provisions, any transfer meeting the statutory requirements must be held subject to the gift tax.

[5] The Commissioner's tax treatment of interest-free demand loans may perhaps be best understood as a two-step approach to such transactions. Under this theory, such a loan has two basic economic components: an

right to use money a "transfer of property" within the intendment of § 2501(a)(1)?

We have little difficulty accepting the theory that the use of valuable property—in this case money—is itself a legally protectible property interest. Of the aggregate rights associated with any property interest, the right of use of property is perhaps of the highest order. One court put it succinctly:

> "'Property' is more than just the physical thing—the land, the bricks, the mortar—it is also the sum of all the rights and powers incident to ownership of the physical thing. It is the tangible and the intangible. Property is composed of constituent elements and of these elements the right to *use* the physical thing to the exclusion of others is the most essential and beneficial. Without this right all other elements would be of little value . . . ." *Passailaigue* v. *United States*, 224 F. Supp. 682, 686 (MD Ga. 1963) (emphasis in original).[6]

What was transferred here was the use of a substantial amount of cash for an indefinite period of time. An analogous interest in real property, the use under a tenancy at will, has long been recognized as a property right. *E. g.*, Restatement (Second) of Property § 1.6 (1977); 3 G. Thompson, Commentaries on the Modern Law of Real Property § 1020 (J. Grimes ed. 1980). For example, a parent who grants to a child the rent-free, indefinite use of commercial property having a reasonable rental value of $8,000 a month has clearly transferred a valuable property right. The

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arm's-length loan from the lender to the borrower, on which the borrower pays the lender a fair rate of interest, followed by a gift from the lender to the borrower in the amount of that interest. See *Crown* v. *Commissioner*, 585 F. 2d 234, 240 (CA7 1978).

[6] See also *Barker* v. *Publishers' Paper Co.*, 78 N. H. 571, 573, 103 A. 757, 758 (1918) ("In its final analysis, the property in any thing consists in the use"); 1 G. Thompson, Commentaries on the Modern Law of Real Property § 5, p. 31 (J. Grimes ed. 1980) ("The use of a given object is the most essential and beneficial quality or attribute of property").

transfer of $100,000 in cash, interest-free and repayable on demand, is similarly a grant of the use of valuable property. Its uncertain tenure may reduce its value, but it does not undermine its status as property. In either instance, when the property owner transfers to another the right to use the object, an identifiable property interest has clearly changed hands.

The right to the use of $100,000 without charge is a valuable interest in the money lent, as much so as the rent-free use of property consisting of land and buildings. In either case, there is a measurable economic value associated with the use of the property transferred. The value of the use of money is found in what it can produce; the measure of that value is interest—"rent" for the use of the funds. We can assume that an interest-free loan for a fixed period, especially for a prolonged period, may have greater value than such a loan made payable on demand, but it would defy common human experience to say that an intrafamily loan payable on demand is not subject to accommodation; its value may be reduced by virtue of its demand status, but that value is surely not eliminated.

This Court has noted in another context that the making of an interest-free loan results in the transfer of a valuable economic right:

> "It is virtually self-evident that extending interest-free credit for a period of time is equivalent to giving a discount equal to the value of the use of the purchase price for that period of time." *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U. S. 643, 648 (1980) *(per curiam).*

Against this background, the gift tax statutes clearly encompass within their broad sweep the gratuitous transfer of the use of money. Just as a tenancy at will in real property is an estate or interest in land, so also is the right to use money a cognizable interest in personal property. The right to use money is plainly a valuable right, readily measurable by reference to current interest rates; the vast banking industry is positive evidence of this reality. Accordingly, we conclude that the interest-free loan of funds is a "transfer of property by gift" within the contemplation of the federal gift tax statutes.[7]

C

Our holding that an interest-free demand loan results in a taxable gift of the use of the transferred funds is fully consistent with one of the major purposes of the federal gift tax statute: protection of the estate tax and the income tax. The legislative history of the gift tax provisions reflects that Congress enacted a tax on gifts to supplement existing estate and income tax laws. H. R. Rep. No. 708, at 28; S. Rep. No. 665, at 40; see also 65 Cong. Rec. 3119–3120, 8095–8096 (1924); Harriss, Legislative History of Federal Gift Taxation, 18 Taxes 531, 536 (1940). Failure to impose the gift tax on interest-free loans would seriously undermine this estate and income tax protection goal.

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[7] Petitioners argue that no gift tax consequences should attach to interest-free demand loans because no "transfer" of property occurs at the time the loan is made. Petitioners urge that the term "transfer" "connotes a discrete, affirmative act whereby a person conveys something to another person, not a continuous series of minute failures to require return of something loaned." Brief for Petitioners 22. We decline to adopt that construction of the statute.

In order to make a taxable gift, a transferor must relinquish dominion and control over the transferred property. Treas. Reg. § 25.2511–2(b), 26 CFR § 25.2511–2(b) (1983). At the moment an interest-free demand loan is made, the transferor has not given up all dominion and control; he could terminate the transferee's use of the funds by calling the loan. As time passes without a demand for repayment, however, the transferor allows the use of the principal to pass to the transferee, and the gift becomes complete. See *ibid.;* Rev. Rul. 69–347, 1969–1 Cum. Bull. 227; Rev. Rul. 69–346, 1969–1 Cum. Bull. 227. As the Court of Appeals realized, 690 F. 2d, at 819, the fact that the transferor's dominion and control over the use of the principal are relinquished over time will become especially relevant in connection with the valuation of the gifts that result from such loans; it does not, however, alter the fact that the lender has made a gratuitous transfer of property subject to the federal gift tax.

A substantial no-interest loan from parent to child creates significant tax benefits for the lender quite apart from the economic advantages to the borrower. This is especially so when an individual in a high income tax bracket transfers income-producing property to an individual in a lower income tax bracket, thereby reducing the taxable income of the high-bracket taxpayer at the expense, ultimately, of all other taxpayers and the Government. Subjecting interest-free loans to gift taxation minimizes the potential loss to the federal fisc generated by the use of such loans as an income tax avoidance mechanism for the transferor. Gift taxation of interest-free loans also effectuates Congress' desire to supplement the estate tax provisions. A gratuitous transfer of income-producing property may enable the transferor to avoid the future estate tax liability that would result if the earnings generated by the property—rent, interest, or dividends—became a part of the transferor's estate. Imposing the gift tax upon interest-free loans bolsters the estate tax by preventing the diminution of the transferor's estate in this fashion.

III

Petitioners contend that administrative and equitable considerations require a holding that no gift tax consequences result from the making of interest-free demand loans. In support of this position, petitioners advance several policy arguments; none withstands studied analysis.

A

Petitioners first advance an argument accepted by the Tax Court in *Crown* v. *Commissioner:*

> "[O]ur income tax system does not recognize unrealized earnings or accumulations of wealth and no taxpayer is under any obligation to continuously invest his money for a profit. The opportunity cost of either letting one's money remain idle or suffering a loss from an unwise investment is not taxable merely because a profit *could*

> *have been made* from a wise investment." 67 T. C., at 1063–1064.

Thus, petitioners argue, an interest-free loan should not be made subject to the gift tax simply because of the possibility that the money lent *might* have enhanced the transferor's taxable income or gross estate had the loan never been made.

This contention misses the mark. It is certainly true that no law requires an individual to invest his property in an income-producing fashion, just as no law demands that a transferor charge interest or rent for the use of money or other property. An individual may, without incurring the gift tax, squander money, conceal it under a mattress, or otherwise waste its use value by failing to invest it. Such acts of consumption have nothing to do with lending money at no interest. The gift tax is an excise tax on *transfers* of property; allowing dollars to lie idle involves no transfer. If the taxpayer chooses not to waste the use value of money, however, but instead transfers the use to someone else, a taxable event has occurred. That the transferor himself could have consumed or wasted the use value of the money without incurring the gift tax does not change this result. Contrary to petitioners' assertion, a holding in favor of the taxability of interest-free loans does not impose upon the transferor a duty profitably to invest; rather, it merely recognizes that certain tax consequences inevitably flow from a decision to make a "transfer of property by gift." 26 U. S. C. §2501(a)(1).

B

Petitioners next attack the breadth of the Commissioner's view that interest-free demand loans give rise to taxable gifts. Carried to its logical extreme, petitioners argue, the Commissioner's rationale would elevate to the status of taxable gifts such commonplace transactions as a loan of the proverbial cup of sugar to a neighbor or a loan of lunch money to a colleague. Petitioners urge that such a result is an untenable intrusion by the Government into cherished zones of privacy, particularly where intrafamily transactions are involved.

Our laws require parents to provide their minor offspring with the necessities and conveniences of life; questions under the tax law often arise, however, when parents provide more than the necessities, and in quantities significant enough to attract the attention of the taxing authorities. Generally, the legal obligation of support terminates when the offspring reach majority. Nonetheless, it is not uncommon for parents to provide their adult children with such things as the use of cars or vacation cottages, simply on the basis of the family relationship. We assume that the focus of the Internal Revenue Service is not on such traditional familial matters. When the Government levies a gift tax on routine neighborly or familial gifts, there will be time enough to deal with such a case.

Moreover, the tax law provides liberally for gifts to both family members and others; within the limits of the prescribed statutory exemptions, even substantial gifts may be entirely tax free. First, under § 2503(e) of the Code, 26 U. S. C. § 2503(e) (1982 ed.), amounts paid on behalf of an individual for tuition at a qualified educational institution or for medical care are not considered "transfer[s] of property by gift" for purposes of the gift tax statutes. More significantly, § 2503(b) of the Code provides an annual exclusion from the computation of taxable gifts of $10,000 per year, per donee; this provision allows a taxpayer to give up to $10,000 annually to each of any number of persons, without incurring any gift tax liability.[8] The "split gift" provision of Code § 2513(a), which effectively enables a husband and wife to give each object of their bounty $20,000 per year without liability for gift tax, further enhances the ability to transfer significant amounts of money and property free of gift tax consequences.[9] Finally, should a taxpayer make gifts during one year that exceed the § 2503(b) annual gift tax exclusion, no gift tax liability will result until the unified credit of Code § 2505 has been exhausted.[10] These generous exclusions, exceptions, and credits clearly absorb the sorts of *de minimis* gifts petitioners envision and render illusory the administrative problems that petitioners perceive in their "parade of horribles."

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[8] During the taxable periods involved in this case, Code § 2503(b) provided an annual exclusion of $3,000 per year, per donee. Section 441(a) of the Economic Recovery Tax Act of 1981, Pub. L. 97–34, 95 Stat. 319, amended § 2503(b) by raising the annual exclusion to $10,000 for transfers made after December 31, 1981.

C

Finally, petitioners urge that the Commissioner should not be allowed to assert the gift taxability of interest-free demand loans because such a position represents a departure from prior Internal Revenue Service practice. This contention rests on the fact that, prior to 1966, the Commissioner had not construed the gift tax statutes and regulations to authorize the levying of a gift tax on the value of the use of money or property. See *Crown* v. *Commissioner*, 585 F. 2d, at 241; *Johnson* v. *United States*, 254 F. Supp. 73 (ND Tex. 1966). From this they argue that it is manifestly unfair to permit the Commissioner to impose the gift tax on the transactions challenged here.

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[9] Under Code § 2513(a), 26 U. S. C. § 2513(a), a husband and wife may elect to treat a gift in fact made by one spouse as having been made one-half by each spouse. Simply put, the net effect of this "gift-splitting" provision is to double the gift tax exclusions and exemptions applicable to each gift by the donor. In some states, of course, community property laws achieve the same "gift-splitting" result. See generally C. Lowndes, R. Kramer, & J. McCord, Federal Estate and Gift Taxes § 35.1 (3d ed. 1974).

[10] Under the gift tax system in effect during the taxable periods involved in this case, former Code § 2521 provided a lifetime gift tax exemption of $30,000 for each taxpayer. Section 2001(b)(3) of the Tax Reform Act of 1976, Pub. L. 94–455, 90 Stat. 1849, replaced the lifetime exemption with a unified credit. As modified by the Economic Recovery Tax Act of 1981, *supra*, the unified credit provided by Code § 2505 is scheduled to increase each year until 1987; at that time, the credit will total $192,800, the equivalent of a lifetime exemption of $600,000 per taxpayer. See Code § 2505(b), 26 U. S. C. § 2505(b) (1982 ed.).

Even accepting the notion that the Commissioner's present position represents a departure from prior administrative practice, which is by no means certain,[11] it is well established that the Commissioner may change an earlier interpretation of the law, even if such a change is made retroactive in effect. *E. g., Dixon* v. *United States*, 381 U. S. 68, 72–75 (1965); *Automobile Club of Michigan* v. *Commissioner*, 353 U. S. 180, 183–184 (1957). This rule applies even though a taxpayer may have relied to his detriment upon the Commissioner's prior position. *Dixon* v. *United States*, *supra*, at 73. The Commissioner is under no duty to assert a particular position as soon as the statute authorizes such an interpretation.[12] See also *Bob Jones University* v. *United States*, 461 U. S. 574 (1983). Accordingly, petitioners' "taxpayer reliance" argument is unavailing.[13]

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[11] The Treasury Regulations implementing the gift tax provisions have always reflected the broad scope of the statutory language. See Treas. Regs. 79, Art. 2 (1933); Treas. Regs. 79, Art. 2 (1936); Treas. Regs. 108, § 86.2(a) (1943). The regulation presently in force is virtually identical to those in effect during the preceding five decades; it provides:

> "The gift tax also applies to gifts indirectly made. Thus, all transactions whereby property or property rights or interests are gratuitously passed or conferred upon another, regardless of the means or device employed, constitute gifts subject to tax." Treas. Reg. § 25.2511–1(c), 26 CFR § 25.2511–1(c) (1983).

The longstanding interpretation of the statute embodied in these regulations indicates that the Commissioner's allegedly novel assertion in 1966 regarding the gift taxability of interest-free demand loans was not without a reasonable and well-established foundation.

[12] Indeed, the explanation for the dearth of pre-1966 cases presenting this precise issue is probably economic; the low interest rates that prevailed until recent years diminished the attractiveness of the interest-free demand loan as a tax-planning device and reduced the likelihood that the value of such loans would exceed the annual gift tax exclusion.

[13] Petitioners' detrimental reliance argument must fail for an additional reason. The interest-free demand loans challenged by the Commissioner in this case were made between 1971 and 1976. The Commissioner first

IV

As we have noted, *supra*, at 341–342, Congress has provided generous exclusions and credits designed to reduce the gift tax liability of the great majority of taxpayers. Congress clearly has the power to provide a similar exclusion for the gifts that result from interest-free demand loans. Any change in the gift tax consequences of such loans, however, is a legislative responsibility, not a judicial one. Until such a change occurs, we are bound to effectuate Congress' intent to protect the estate and income tax systems with a broad and comprehensive tax upon all "transfer[s] of property by gift." Cf. *Diedrich* v. *Commissioner*, 457 U. S. 191, 199 (1982).

We hold, therefore, that the interest-free demand loans shown by this record resulted in taxable gifts of the reasonable value of the use of the money lent.[14] Accordingly, the

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litigated the question of the gift taxability of such loans in *Johnson* v. *United States*, 254 F. Supp. 73 (ND Tex. 1966). Six years later, in Rev. Rul. 73–61, 1973–1 Cum. Bull. 408, the Commissioner formally announced the position that interest-free demand loans give rise to taxable gifts. Because approximately half the loans in this case were made after the Commissioner had issued Rev. Rul. 73–61, petitioners are hardly in a position to argue that they relied to their detriment on a different interpretation of the gift tax statute.

[14] In determining the value of the gifts made by Paul and Esther Dickman to Lyle Dickman and Artesian, the Commissioner applied to the loan balances outstanding during each taxable quarter certain interest rates derived from § 6621 of the Code, 26 U. S. C. § 6621. See n. 2, *supra*. The Court of Appeals declined to address the question, but remanded to the Tax Court for consideration of the method by which the gifts associated with interest-free demand loans should be valued. 690 F. 2d, at 820, and n. 11. The valuation issue is therefore not presented on the record before us. We note, however, that to support a gift tax on the transfer of the use of $100,000 for one year, the Commissioner need not establish that the funds lent did in fact produce a particular amount of revenue; it is sufficient for the Commissioner to establish that a certain yield could readily be secured and that the reasonable value of the use of the funds can be reliably ascertained.

judgment of the United States Court of Appeals for the Eleventh Circuit is

Affirmed.

JUSTICE POWELL, with whom JUSTICE REHNQUIST joins, dissenting.

The Court's decision today rejects a longstanding principle of taxation, and creates in its stead a new and anomalous rule of law. Such action is best left to Congress.[1]

I

The Internal Revenue Service's attempts to assess gift taxes on interest-free demand loans is a relatively new development in the field of tax law. The gift tax provisions of the Internal Revenue Code were enacted in 1932.[2] For 34 years—a third of a century—the IRS enforced these provisions without any intimation that an interest-free loan would have gift tax consequences. The IRS first pursued its present position in 1966 in *Johnson* v. *United States*, 254 F. Supp.

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[1] In *United States* v. *Byrum*, 408 U. S. 125 (1972), the Court stated: "Courts properly have been reluctant to depart from an interpretation of tax law which has been generally accepted when the departure could have potentially far-reaching consequences. When a principle of taxation requires re-examination, Congress is better equipped than a court to define precisely the type of conduct which results in tax consequences." *Id.*, at 135.

[2] See Revenue Act of 1932, ch. 209, 47 Stat. 169. The provisions of the gift tax code at issue in this case, 26 U. S. C. §§ 2501(a)(1) and 2511(a), have remained virtually unchanged since its original enactment in 1932. Section 501 of the 1932 Act provided:

"(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift.

"(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible . . . ."

73 (ND Tex.).[3] The District Court in *Johnson* rejected the argument that taxpayers who have made large interest-free loans also have made gifts equal to the value of the use of the money lent. *Id.*, at 77. The Commissioner did not appeal the *Johnson* decision. Indeed, he waited seven years to announce his nonacquiescence in the outcome of that case. See Rev. Rul. 73–61, 1973–1 Cum. Bull. 408.

In 1977, the Commissioner first raised the issue before the Tax Court in *Crown* v. *Commissioner*, 67 T. C. 1060. Relying on the *Johnson* court's holding and the relative novelty of the Commissioner's position, the Tax Court refused to assess gift taxes on interest that *could have been* earned on borrowed money. *Id.*, at 1063. The Court of Appeals for the Seventh Circuit affirmed the decision. 585 F. 2d 234 (1978). The Commissioner did not seek review of the *Crown* decision in this Court. He did announce promptly the Service's nonacquiescence.

The Tax Court reiterated its position in 1980 in the case *sub judice*. Not until 1982, when the Court of Appeals for the Eleventh Circuit reversed the Tax Court in this case, had any court accepted the Commissioner's belated interpretation of § 2501(a)(1).[4] During the 18-year period that the

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[3] The Court purports to find a "reasonable and well-established foundation" for that position in Treas. Reg. § 25.2511–1(c). *Ante*, at 343, n. 11. The Court relies on the term "gift indirectly made" as contemplating an interest-free loan. The flaw in this reliance is that the regulations explicitly express a contrary intent: "A gift is *incomplete* in every instance in which a donor reserves the power to revest the beneficial title to the property in himself." Treas. Reg. § 25.2511–2(c) (emphasis added). The language in both sections originated in the 1933 regulations. See Treas. Reg. 79, Arts. 2 and 3 (1933).

[4] The Commissioner has met with an equal lack of success in his attempts to impute interest on interest-free loans and include it in the gross income of the borrower. Each of the seven Federal Courts of Appeals that has considered the question has refused to attach federal income tax consequences to interest-free loans in the absence of congressional action on the subject. See *Hardee* v. *United States*, 708 F. 2d 661 (CA Fed. 1983); *Parks* v. *Commissioner*, 686 F. 2d 408 (CA6 1982); *Baker* v. *Commissioner*, 677 F. 2d 11 (CA2 1982); *Commissioner* v. *Greenspun*, 670 F. 2d

Commissioner has pursued this position, Congress has not attempted to settle the controversy through legislation.[5]

Gift taxation, like most forms of federal taxation, is a complex area, made all the more complex by Congress' frequent amendment of the underlying statute. Because the tax system is basically one of self-assessment, complexities and uncertainties in the gift taxation area put a heavy burden on taxpayers who conscientiously try to adhere to the dictates of the Tax Code. Courts should make a conscious effort to minimize this burden by refraining from any action that would destabilize an understanding of the tax laws long accepted both by the IRS and taxpayers.

As the above chronology illustrates, until 1982, a longstanding principle of gift tax law, supported by IRS inaction and judicial opinion, was that interest-free demand loans had no gift tax significance. Relying on this principle, taxpayers made loans, tax commentators suggested making loans,[6] and

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123 (CA9 1982); *Beaton* v. *Commissioner*, 664 F. 2d 315 (CA1 1981); *Martin* v. *Commissioner*, 649 F. 2d 1133 (CA5 1981); *Suttle* v. *Commissioner*, 625 F. 2d 1127 (CA4 1980).

[5] During the period between the *Johnson* decision and the Court of Appeals' decision in this case, Congress amended the gift tax statute on eight separate occasions. See Economic Recovery Tax Act of 1981, Pub. L. 97–34, 95 Stat. 172; Revenue Act of 1978, Pub. L. 95–600, 92 Stat. 2763; Tax Reform Act of 1976, Pub. L. 94–455, 90 Stat. 1520; Internal Revenue Code Amendments of 1974, Pub. L. 93–625, 88 Stat. 2108; Excise, Estate, and Gift Tax Adjustment Act of 1970, Pub. L. 91–614, 84 Stat. 1836; Tax Reform Act of 1969, Pub. L. 91–172, 83 Stat. 487; Foreign Investors Tax Act of 1966, Pub. L. 89–809, 80 Stat. 1539; Pub. L. 89–365, 80 Stat. 32. Although Congress is presumed to be aware of judicial interpretations of a statute, none of the eight amending Acts altered the *Johnson* and *Crown* courts' interpretation of the statute.

[6] See, *e. g.*, Edwards, What Planning Opportunities Does CA–7's No-Gift-Tax Holding in Crown Open Up?, 50 J. Tax. 168, 170 (1979); Mitchell, Interest-Free Loans: Opportunities For Tax Planning, 65 A. B. A. J. 634, 636 (1979); Taicher, How to Use Interest-Free Loans in Family Tax Planning, 11 Practical Accountant 24 (Sept. 1978); Cooper, A Voluntary Tax? New Perspectives on Sophisticated Estate Tax Avoidance, 77 Colum. L. Rev. 161, 186 (1977); Tidwell, Lester Crown Points the Way to Estate Tax Reduction Under the 1976 Tax Reform Act, 55 Taxes 651, 655 (1977).

tax counselors used loans as integral parts of complex taxation minimization plans.[7] In my view, petitioners' reliance also was justified.

Despite this justified reliance, the Court today subjects potentially all interest-free loans to gift taxation. The adverse effects of the Court's holding could be substantial. Many taxpayers may have used interest-free loans as an important part of a comprehensive plan to sell their business to a son, to send a daughter to medical school, or to provide for the support of an elderly parent. Such plans are not revamped easily. In addition, the recipients of the loans may not be in a position to help the taxpayers/lenders avoid future gift tax liability by making immediate repayment. The borrowed funds may have been invested in fixed assets or the borrowers simply may have spent the money. The result, in any event, is the assessment of gift taxes that might have been avoided lawfully if the taxpayer could have anticipated the Court's holding in this case. In light of the Commissioner's decision over a 34-year span to attach no significance to such loans, and his lack of success over the past 18 years in attempting to tax such loans, the Court of Appeals' decision is so fundamentally unfair that this Court should be unwilling to add its *imprimatur*.

II

There can be little doubt that the courts are not the best forum for consideration of the ramifications of the gift taxation of interest-free loans. Congress is the body that is best equipped to determine the rules that should govern. *United States* v. *Byrum*, 408 U. S. 125, 135 (1972); *Commissioner* v. *Brown*, 380 U. S. 563, 579 (1965). The Court implies that Congress has considered this issue and decided that interest-free loans involve a "transfer" of the use-value of the money. The Court bases its position in large part on a "plain language" argument. It states: "The language of [§§ 2501(a)(1) and 2511(a)] is clear and admits of but one reasonable interpretation . . . ." *Ante*, at 334. The Court also states that the Committee Reports in 1932 "make plain" that Congress intended to tax all "transfers" such as those involved in this case.

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[7] One indication of the role that tax counselors have played in the use of tax-free loans is the fact that two law firms filed *amicus* briefs in this case on behalf of themselves and in support of petitioners' position.

This is a singularly curious argument. In effect, the Court is saying that for 34 years (1932 until 1966)—despite the plain language of the statute and clear intention of Congress—the Commissioner slept on the rights of the United States. Moreover, in view of his relative inactivity until this suit was instituted in 1980 and pursued on appeal,[8] it hardly can be said that the Commissioner was diligent if the Court today is correct as to what Congress "plainly" instructed him to do. Interestingly, until 1982 all three of the courts that had considered these statutes had found their language far from plain. In light of the apparent difficulty that the Commissioner and the IRS have had in discerning legislative intent from the statutory provisions at issue here, the preferable course would be to await a clear directive from Congress. Nevertheless, the Court, rather than deferring to a legislative resolution of the serious problems associated with this field, adopts an open-ended interpretation of § 2501(a) not even advanced until 1966 and not accepted by any court until 1982.

The most troublesome issue generated by the Court's opinion is the scope of its new reading of the statute. The Court does not limit its holding to interest-free loans of money. The Court states: "We have little difficulty accepting the theory that the use of valuable property . . . is itself a legally protectible property interest." *Ante*, at 336. Under this theory, potential tax liability may arise in a wide range of situations involving the unrecompensed use of property. Examples could include the rent-free use of a home by a child over the age of minority who lives with his parents, or by a parent over the age of self-support who lives with her child. Taken to its logical extreme, this theory would make the loan of a car for a brief period a potentially taxable event.

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[8] As noted *supra*, at 346, the Commissioner did not appeal the District Court's holding in *Johnson*, delayed for seven years before deciding to announce his nonacquiescence, and did not seek review by this Court of the Seventh Circuit's opinion in *Crown*.

The possibility that the generous use by friends or family of property such as homes and even spare bedrooms could result in the imposition of gift tax liability highlights the valuation problems that certainly will result from the Court's holding. It is often difficult to place a value on outright ownership of items of real and personal property. Those difficulties multiply when the interest to be valued is the *use* of the property for varying lengths of time. Even in the simplest case—where the property that is borrowed is cash—valuation problems arise. In the three decided cases in which the Commissioner belatedly pursued the theory that the Court adopts today, the Service used three different methods for determining the interest rate that should be used to establish the use-value of the borrowed money.[9] Thus, it is clear that the Court's decision will generate substantial valuation problems.

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[9] In *Johnson* v. *United States*, 254 F. Supp. 73 (ND Tex. 1966), the Service apparently computed the amount of the gift using the interest rate specified in the regulations for valuing annuities, life estates, terms for years, remainders, and reversions. *Id.*, at 76; see Treas. Reg. § 25.2512–5. In *Crown* v. *Commissioner*, 67 T. C. 1060 (1977), the Service used a rate that it considered reasonable under the circumstances. *Id.*, at 1061. In this case, the rate was that specified in IRC § 6621 for determining interest due on underpayments or refunds of taxes. 690 F. 2d 812, 814, n. 4 (CA11 1982). The Service has urged yet another method in a recently docketed Tax Court case, *LaRosa* v. *Commissioner*, No. 29632–82. In *LaRosa*, the Service has arrived at a separate interest rate for each month the loan was outstanding. The monthly interest rates were provided by an "expert" who relied on estimated fair market interest rates considering the creditworthiness of the borrowers. On an annualized basis, the rates used in *LaRosa* range from 12.5% to 31.1%.

The Court downplays the significance of its decision by "assum[ing] that the focus of the Internal Revenue Service is not on such traditional familial matters [as the use of cars or homes]." *Ante*, at 341. The Court also concludes that the Tax Code's "generous exclusions, exceptions, and credits clearly absorb the sorts of *de minimis* gifts petitioners envision and render illusory the administrative problems that petitioners perceive." *Ante*, at 342. In effect, the Court has chosen to turn its back on the ramifications of its decision.

The Court, aware of the potential for abuse of its new interpretation, "assume[s]" that the Internal Revenue Service will exercise the power conferred on it in a reasonable way. *Ante*, at 341. This assumption is not likely to afford much comfort to taxpayers and the lawyers and accountants who advise them. The Commissioner, acting with utmost goodwill, is confronted with a dilemma. This Court today holds that the plain language of the statute mandates, and that Congress intended, the "gift tax statute to reach *all* gratuitous transfers of *any* valuable interest in property." *Ante*, at 334 (emphasis supplied). No discretion is given the Commissioner and the IRS to read "all" and "any" as meaning only such transfers and only such valuable interests in property that it seems reasonable to tax. The Court identifies no statutory basis for such discretion, and even if the Court itself undertook to confer it I am not aware that we have ever before "assumed" that *tax laws* would be enforced—not according to their letter—but reasonably.

III

The Court's answer to these concerns is that the exceptions and exemptions in the Tax Code will render most administrative problems "illusory." *Ante*, at 342. Although the $10,000 annual per donee exclusion will shield many taxpayers from having to pay gift taxes on intrafamily loans, the taxpayer cannot know whether he has exceeded the annual limit until he has assigned a value to every "transfer" that falls within the Court's definition. In particular, a taxpayer who has made outright gifts during the year, approaching in dollar value the amount of the applicable annual exclusion, must be concerned with the value of intrafamily loans. Once he has exceeded the exclusion, he must file a gift tax return, listing and describing each gift. IRC § 6019(1) (1982 ed.); Treas. Reg. § 25.6019–4.

Nor does it suffice to say that most taxpayers will be protected from payment of gift taxes by the Tax Code's "lifetime exemption." Regardless of the availability of an offsetting credit, all taxpayers who exceed the annual per donee exclusion must go through the uncertain process of valuing intrafamily loans and filing a gift tax return. Moreover, a taxpayer's reduction of the unified credit lessens the amount of credit that will be available to offset estate taxes at the time of his death. In short, the net result of the Court's decision will be to create potential tax liability for many taxpayers who have never been subject to it before, and create legal, tax accounting, and return filing nightmares for many others.

The Court also fails to discuss the anomalies that today's decision will create in the tax laws. For instance, the Tax Code expressly provides that gifts are excluded from the gross income of the recipients for income tax purposes. IRC § 102. Under the Court's holding, a gift will be imputed with respect to each interest-free loan, with potential gift tax consequences for the lender. In many, perhaps most, cases, however, the borrowed funds will not generate specifically identifiable income. As a result, the lender may have gift tax liability, but the borrower is unable to exclude a commensurate amount from his income under § 102. Also, under the Court's reasoning, an interest-free loan to a charity entails a gift equal to the use-value of the funds loaned. Ordinarily, a gift to a charity is not subject to gift taxes and is deductible from a taxpayer's gross income. IRC §§ 170 and 2522. Under the provisions of the Tax Code and regulations, however, an interest-free loan does not generate an income tax deduction and is subject to gift taxes. IRC § 2522(c); Treas. Reg. § 1.170A–7(d). Thus, an outright gift to a charity would provide an income tax deduction and would not be subject to gift tax, while a no-interest loan of the same amount would generate no income tax benefits and might generate gift tax liability.

None of the problems and anomalies I have outlined is insurmountable. They do involve, however, delicate issues of policy that should be addressed in the legislative forum.[10] Instead of recognizing the longstanding practice of attaching no gift tax consequences to interest-free loans of money and property, and leaving these difficult issues to the body responsible for legislating tax policy, the Court now allows the Commissioner to decide these questions without guidance. That course is ill-advised and inequitable.[11]

I dissent.

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[10] I am not addressing the tax *policy* question whether there is a "loophole" that should be closed. It is my view that a long accepted interpretation of a tax statute should be changed only by Congress.

[11] In addition to my disagreement with the Court's interpretation of § 2501(a), I find the application of that interpretation to petitioners particularly unfair. The Commissioner first announced his nonacquiesence in the *Johnson* decision in early 1973. The loans at issue here spanned from 1971 to 1976. Thus, for two of the years for which the Commissioner assessed gift taxes, petitioners would have had no way of knowing that the outstanding interest-free loans might have gift tax consequences. In my view, retroactive application of the Court's holding in cases such as this is so fundamentally unfair that it would constitute an abuse of the Commissioner's discretion. See *Central Illinois Public Service Co.* v. *United States*, 435 U. S. 21, 34 (1978) (BRENNAN, J., concurring).

UNITED STATES *v.* ONE ASSORTMENT OF 89 FIREARMS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 82-1047. Argued November 30, 1983—Decided February 22, 1984

Upon trial in Federal District Court, defendant Mulcahey, who asserted the defense of entrapment, was acquitted of charges of knowingly engaging in the business of dealing in firearms without a license, in violation of 18 U. S. C. § 922(a)(1). The Government then instituted this *in rem* action for forfeiture of the firearms involved, pursuant to 18 U. S. C. § 924(d), which authorizes forfeitures of any firearms "involved in or used or intended to be used in, any violation of the provisions of this chapter." Ordering forfeiture, the District Court rejected Mulcahey's defenses of res judicata and collateral estoppel based on his earlier acquittal. The Court of Appeals reversed, concluding that because the § 924(d) forfeiture proceeding was criminal and punitive in nature, it was barred by double jeopardy principles in view of Mulcahey's prior acquittal. Relying on *Coffey* v. *United States*, 116 U. S. 436, the Court of Appeals also held that the forfeiture action was barred by collateral estoppel, because it was based upon the same facts as the earlier criminal action.

Held: A gun owner's acquittal on criminal charges involving firearms does not preclude a subsequent *in rem* forfeiture proceeding against those firearms under § 924(d). Pp. 357–366.

(a) To the extent that *Coffey* v. *United States*, *supra*, suggests that collateral estoppel or double jeopardy automatically bars a civil, remedial forfeiture proceeding following an acquittal on related criminal charges, it is disapproved. Cf. *Helvering* v. *Mitchell*, 303 U. S. 391; *One Lot Emerald Cut Stones* v. *United States*, 409 U. S. 232. Pp. 357–361.

(b) The difference in the relative burdens of proof in the criminal and civil actions precludes the application of the doctrine of collateral estoppel. Acquittal on a criminal charge merely reflects the existence of a reasonable doubt as to Mulcahey's guilt, not innocence. Nor did the acquittal negate the possibility that a preponderance of the evidence in the forfeiture proceeding could show that Mulcahey was engaged in an unlicensed firearms business. Pp. 361–362.

(c) The Double Jeopardy Clause does not apply to civil proceedings and is not applicable here. Under the procedural mechanisms established for enforcing forfeitures under § 924(d), Congress intended such forfeitures to be civil and remedial, rather than criminal and punitive. Moreover, the differences in the language of § 924(d), which subjects to forfeiture firearms used or "intended to be used" in substantive offenses, and § 922(a)(1), which does not render unlawful mere *intention* to deal in firearms without a license, shows that the forfeiture provisions were meant to be broader in scope than the criminal sanctions. The forfeiture provision also furthers broad remedial aims of controlling the indiscriminate flow of firearms. Nor is the statutory scheme so punitive either in purpose or effect as to negate Congress' intention to establish a civil remedial mechanism. Pp. 362–366.

685 F. 2d 913, reversed and remanded.

BURGER, C. J., delivered the opinion for a unanimous Court.

Richard G. Wilkins argued the cause for the United States. With him on the briefs were *Solicitor General Lee, Assistant Attorney General Jensen, Deputy Solicitor General Frey, Sidney M. Glazer,* and *Vincent Gambale.*

Herbert W. Louthian argued the cause for respondent. With him on the brief was *Richard E. Gardiner.**

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether a gun owner's acquittal on criminal charges involving firearms precludes a subsequent *in rem* forfeiture proceeding against those same firearms.

I

A

On January 20, 1977, the Bureau of Alcohol, Tobacco, and Firearms seized a cache of firearms from the home of Patrick Mulcahey. Mulcahey was subsequently indicted on charges that he had knowingly engaged in the business of dealing in firearms without a license, in violation of 18 U. S. C.

**John L. Pottenger, Jr.*, and *Steven Wizner* filed a brief for the Jerome N. Frank Legal Services Organization of the Yale Law School as *amicus curiae* urging affirmance.

§ 922(a)(1).[1] At his criminal trial, Mulcahey admitted that he had no license to deal in firearms and that he had bought and sold firearms during the period set forth in the indictment. His defense was that he had been entrapped into making the illegal firearms transactions. The jury returned a verdict of not guilty.

Following Mulcahey's acquittal of the criminal charges, the United States, pursuant to its authority under 18 U. S. C. § 924(d),[2] instituted this *in rem* action for forfeiture of the seized firearms.[3] On the basis of his earlier acquittal, Mulcahey asserted the defenses of res judicata and collateral estoppel. The United States District Court for the District of South Carolina struck Mulcahey's defenses, reasoning that an *in rem* forfeiture proceeding under 18 U. S. C. § 924(d) is remedial in nature and is therefore properly characterized as a civil proceeding. 463 F. Supp. 365, 367 (1978). The District Court then concluded that "the firearms here in question were involved in, used or intended to be used in violation of 18 U. S. C. § 922(a)(1). Such firearms are rendered subject to forfeiture under 18 U. S. C. § 924(d), which forfeiture is hereby ordered." 511 F. Supp. 133, 139 (1980).

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[1] Title 18 U. S. C. § 922(a)(1) provides:

"It shall be unlawful . . . for any person, except a licensed importer, licensed manufacturer, or licensed dealer, to engage in the business of importing, manufacturing, or dealing in firearms or ammunition, or in the course of such business to ship, transport, or receive any firearm or ammunition in interstate or foreign commerce."

[2] Title 18 U. S. C. § 924(d) provides:

"Any firearm or ammunition involved in or used or intended to be used in, any violation of the provisions of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, shall be subject to seizure and forfeiture and all provisions of the Internal Revenue Code of 1954 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter."

[3] The number of firearms involved in this action has varied somewhat with time. Federal agents originally seized 105 firearms from Mulcahey, but later learned that 13 of them had been stolen. The stolen items were returned to their rightful owners, and the forfeiture action proceeded against the remaining 92 items. Later an additional automatic pistol was found, bringing the total to 93. Still later, for reasons not relevant here, 4 of the seized firearms were returned to Mulcahey's wife, leaving 89 firearms as the subject of the forfeiture proceeding.

B

A divided United States Court of Appeals for the Fourth Circuit, sitting en banc, reversed.[4] 685 F. 2d 913 (1982). The en banc majority relied upon two theories for its conclusion that the forfeiture proceeding against these firearms was barred by Mulcahey's prior acquittal, although it did not sharply distinguish between the two. Because the majority considered the § 924(d) forfeiture proceeding to be criminal and punitive in nature, the Court of Appeals concluded that it was barred by double jeopardy principles. Looking to *Coffey* v. *United States*, 116 U. S. 436 (1886), as authority, the Court of Appeals also determined that the forfeiture action was barred by collateral estoppel, because it was based upon the same facts as the earlier criminal action. In dissent, four judges argued that neither collateral estoppel nor double jeopardy should preclude forfeiture proceedings brought under § 924(d). 685 F.2d, at 918–919 (Winter, J., joined by Butzner, Russell, and Murnaghan, JJ., dissenting). We granted certiorari, 459 U. S. 1199 (1983), and we reverse.

I

In *Coffey* v. *United States*, *supra*, this Court held that a forfeiture action brought against certain distilling equipment was barred by the owner's prior acquittal on charges of removing and concealing distilled spirits with the intent to defraud the revenue. The Court stated:

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[4] A divided panel of the Fourth Circuit had previously reversed the District Court's forfeiture order. 669 F. 2d 206 (1982).

> "[W]here an issue raised as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United States, and a judgment of acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person, on the subsequent trial of a suit *in rem* by the United States, where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit *in rem.* It is urged as a reason for not allowing such effect to the judgment, that the acquittal in the criminal case may have taken place because of the rule requiring guilt to be proved beyond a reasonable doubt, and that, on the same evidence, on the question of preponderance of proof, there might be a verdict for the United States, in the suit *in rem.* Nevertheless, the fact or act has been put in issue and determined against the United States; and all that is imposed by the statute, as a consequence of guilt, is a punishment therefor. There could be no new trial of the criminal prosecution after the acquittal in it; and a subsequent trial of the civil suit amounts to substantially the same thing, with a difference only in the consequences following a judgment adverse to the claimant." *Id.*, at 443.

Although the language quoted above incorporates notions of both collateral estoppel and double jeopardy, the *Coffey* Court did not identify the precise legal foundation for the rule of preclusion it announced. Perhaps for this reason, later decisions of this Court have reflected uncertainty as to the exact scope of the *Coffey* holding.

In *Helvering* v. *Mitchell*, 303 U. S. 391 (1938), the Court considered the preclusive effect of a prior criminal acquittal on a subsequent action for a monetary penalty. The defendant taxpayer in *Mitchell* was acquitted of charges that he willfully attempted to evade and defeat the income tax by fraudulently misstating certain items on his income tax return. When the Commissioner of Internal Revenue then brought an action to recover a substantial monetary penalty for fraudulent avoidance of income tax, the taxpayer argued that the subsequent penalty action was barred by res judicata, collateral estoppel, and the *Coffey* rule of preclusion.

This Court, speaking through Justice Brandeis, disagreed. Although the taxpayer argued and the Government conceded that the factual matters at issue in the penalty proceeding had been litigated and determined in the prior criminal action, the Court concluded that "[t]he difference in degree of the burden of proof in criminal and civil cases precludes application of the doctrine of *res judicata*." 303 U. S., at 397. The *Mitchell* Court viewed the criminal acquittal as nothing more than a determination that the evidence in the criminal setting was not sufficient to overcome all reasonable doubt that the accused was guilty. See *Lewis* v. *Frick*, 233 U. S. 291, 302 (1914). The Court went on to state:

> "That acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based has long been settled. *Stone* v. *United States*, 167 U. S. 178, 188; *Murphy* v. *United States*, 272 U. S. 630, 631, 632. Compare *Chantangco* v. *Abaroa*, 218 U. S. 476, 481, 482." 303 U. S., at 397–398 (footnote omitted).

Turning to the taxpayer's argument that double jeopardy barred the assessment of a monetary penalty following his acquittal on related criminal charges, the Court noted:

> "Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense. The question for decision is thus whether

> [the monetary penalty] imposes a criminal sanction. That question is one of statutory interpretation." *Id.*, at 399.

In concluding that the monetary penalty was merely a remedial civil sanction authorized by Congress to be assessed at the discretion of those administering the tax law, the Court observed that forfeiture of goods or their value and the payment of fixed or variable sums of money are sanctions that have long been recognized as enforceable by civil proceedings. *Id.*, at 400.

Finally, the *Mitchell* Court considered the effect of the holding in *Coffey* upon the facts before it. The Court distinguished *Coffey* on the ground that the *Coffey* rule did not apply where an acquittal on a criminal charge was followed by a civil action requiring a different degree of proof. The *Mitchell* Court concluded that the monetary penalty imposed by the revenue laws was a civil administrative sanction; it therefore found *Coffey* no obstacle to the recovery of the penalty from the taxpayer. 303 U. S., at 405–406.

Most recently, in *One Lot Emerald Cut Stones* v. *United States*, 409 U. S. 232 (1972) *(per curiam)*, the Court held that a civil action for forfeiture of a ring and stones was not barred by the owner's prior acquittal on charges of willfully and knowingly, with intent to defraud the United States, smuggling articles into the United States without complying with customs procedures. Reaffirming the principles articulated in *Helvering* v. *Mitchell*, *supra*, the Court reasoned that the difference between the burdens of proof in the criminal and civil cases precluded the application of the doctrine of collateral estoppel. Double jeopardy was equally inapposite, the Court continued, because the forfeiture asserted against the ring and stones was a civil, not a criminal, sanction. The Court distinguished *Coffey* on the ground that acquittal on the criminal charges in *One Lot Emerald Cut Stones* did not necessarily resolve the issues in the later forfeiture action. 409 U. S., at 235, n. 5.

In focusing on *Coffey* v. *United States*, the Court of Appeals appears to have overlooked the significance of *Mitchell* and *One Lot Emerald Cut Stones*. At the very least, *Mitchell* signaled that an acquittal of a criminal charge does not automatically bar an action to enforce sanctions by way of forfeiture of goods or other civil penalties. Whatever the validity of *Coffey* on its facts, its ambiguous reasoning seems to have been a source of confusion for some time. As long ago as *Mitchell*, this Court was urged to disapprove *Coffey* so as to make clear that an acquittal in a criminal trial does not bar a civil action for forfeiture even though based on the identical facts. Indeed, for nearly a century, the analytical underpinnings of *Coffey* have been recognized as less than adequate.[5] The time has come to clarify that neither collateral estoppel nor double jeopardy bars a civil, remedial forfeiture proceeding initiated following an acquittal on related criminal charges. To the extent that *Coffey* v. *United States* suggests otherwise, it is hereby disapproved.

III

A

The disposition of the instant case follows readily from the principles articulated in *Mitchell* and *One Lot Emerald Cut Stones*. Mulcahey first argues that, because of his earlier criminal acquittal, the doctrine of collateral estoppel operates to preclude the § 924(d) forfeiture action. But an acquittal on criminal charges does not prove that the defendant is innocent; it merely proves the existence of a reasonable doubt as to his guilt. We need not be concerned whether the jury decided to acquit Mulcahey because he was entrapped into making an illegal sale or whether the jurors were not convinced of his guilt beyond a reasonable doubt for other reasons. In either case, the jury verdict in the criminal action did not negate the possibility that a preponderance of the evidence could show that Mulcahey was engaged in an unlicensed firearms business. Mulcahey's acquittal on charges brought under § 922(a)(1) therefore does not estop the Government from proving in a civil proceeding that the firearms should be forfeited pursuant to § 924(d). It is clear that the difference in the relative burdens of proof in the criminal and civil actions precludes the application of the doctrine of collateral estoppel. *Helvering* v. *Mitchell*, 303 U. S., at 397; *One Lot Emerald Cut Stones* v. *United States*, *supra*, at 235.

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[5] See, *e. g.*, *United States* v. *Burch*, 294 F. 2d 1, 3, n. 2 (CA5 1961); *United States* v. *One Dodge Sedan*, 113 F. 2d 552, 553, and n. 1 (CA3 1940) (collecting cases and law review articles); 1B J. Moore, J. Lucas, & T. Currier, Moore's Federal Practice ¶ 0.418[3], pp. 587–589, and n. 12 (1983) (collecting cases).

B

Mulcahey next contends that a forfeiture proceeding under § 924(d) is barred by the Double Jeopardy Clause of the Fifth Amendment. Unless the forfeiture sanction was intended as punishment, so that the proceeding is essentially criminal in character, the Double Jeopardy Clause is not applicable. *Helvering* v. *Mitchell*, 303 U. S., at 398–399. The question, then, is whether a § 924(d) forfeiture proceeding is intended to be, or by its nature necessarily is, criminal and punitive, or civil and remedial. Resolution of this question begins as a matter of statutory interpretation. *Id.*, at 399. As the Court noted in *United States* v. *Ward*, 448 U. S. 242, 248 (1980):

> "Our inquiry in this regard has traditionally proceeded on two levels. First, we have set out to determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other. See *One Lot Emerald Cut Stones* v. *United States*, *supra*, at 236–237. Second, where Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or

> effect as to negate that intention. See *Flemming* v. *Nestor,* 363 U. S. 603, 617–621 (1960)."

Applying the first prong of the *Ward* test to the facts of the instant case, we conclude that Congress designed forfeiture under § 924(d) as a remedial civil sanction. Congress' intent in this regard is most clearly demonstrated by the procedural mechanisms it established for enforcing forfeitures under the statute. Section 924(d) does not prescribe the steps to be followed in effectuating a forfeiture, but rather incorporates by reference the procedures of the Internal Revenue Code of 1954 (Code), 26 U. S. C. §§ 7321–7328. The Code in turn provides that an action to enforce a forfeiture "shall be in the nature of a proceeding in rem in the United States District Court for the district where such seizure is made." 26 U. S. C. § 7323. In contrast to the *in personam* nature of criminal actions, actions *in rem* have traditionally been viewed as civil proceedings, with jurisdiction dependent upon seizure of a physical object. See *Calero-Toledo* v. *Pearson Yacht Leasing Co.,* 416 U. S. 663, 684 (1974). In addition to establishing the *in rem* nature of the action, the Code authorizes a summary administrative proceeding for forfeiture of items valued at $2,500 or less, for which notice of a seizure may be by publication. See 26 U. S. C. § 7325. By creating such distinctly civil procedures for forfeitures under § 924(d), Congress has "indicate[d] clearly that it intended a civil, not a criminal, sanction." *Helvering* v. *Mitchell, supra,* at 402.

Moreover, § 924(d) is somewhat broader in scope than the criminal provisions of 18 U. S. C. § 922. Section 924(d) subjects to forfeiture "[a]ny firearm or ammunition involved in or used *or intended to be used in,* any violation of the provisions of this chapter." (Emphasis added.) But § 922(a)(1), the substantive criminal provision under which Mulcahey was prosecuted, does not render unlawful an *intention* to engage in the business of dealing in firearms without a license; only the completed act of engaging in the prohibited business is made a crime. See n. 1, *supra*. Whatever the actual scope of the conduct embraced by § 924(d), it is apparent from the differences in the language of these two statutes that the forfeiture provisions of § 924(d) were meant to be broader in scope than the criminal sanctions of § 922(a)(1).

Finally, the forfeiture provision of § 924(d) furthers broad remedial aims. Section 924(d) was enacted as part of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90–351, 82 Stat. 233, and later retained without alteration in the Gun Control Act of 1968, Pub. L. 90–618, 82 Stat. 1224. In enacting the 1968 gun control legislation, Congress "was concerned with the widespread traffic in firearms and with their general availability to those whose possession thereof was contrary to the public interest." *Huddleston* v. *United States*, 415 U. S. 814, 824 (1974). Accordingly, Congress sought to "control the indiscriminate flow" of firearms and to "assist and encourage States and local communities to adopt and enforce stricter gun control laws." H. R. Rep. No. 1577, 90th Cong., 2d Sess., 8 (1968). Section 924(d) plays an important role in furthering the prophylactic purposes of the 1968 gun control legislation by discouraging unregulated commerce in firearms and by removing from circulation firearms that have been used or intended for use outside regulated channels of commerce. Keeping potentially dangerous weapons out of the hands of unlicensed dealers is a goal plainly more remedial than punitive. Accordingly, we hold that Congress viewed § 924(d) forfeiture as a remedial civil sanction rather than a criminal punishment.[6]

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[6] Mulcahey relies heavily upon Congress' labeling of § 924 with the appellation "Penalties," arguing that inclusion of the forfeiture provision in that section demonstrates Congress' intention to create an additional criminal sanction. This argument is unavailing; both criminal and civil sanctions may be labeled "penalties." Moreover, the congressional Reports accompanying § 924 describe it as "*contain[ing] the penalty and forfeiture provisions*," H. R. Rep. No. 1577, 90th Cong., 2d Sess., 17 (1968); S. Rep. No. 1097, 90th Cong., 2d Sess., 117 (1968), indicating that Congress was cognizant of the important differences between criminal punishment and *in rem* forfeiture.

We now turn to the second aspect of our inquiry: "whether the statutory scheme [is] so punitive either in purpose or effect as to negate" Congress' intention to establish a civil remedial mechanism. *United States* v. *Ward,* 448 U. S., at 248–249. "'Only the clearest proof'" that the purpose and effect of the forfeiture are punitive will suffice to override Congress' manifest preference for a civil sanction. *Id.,* at 249 (quoting *Flemming* v. *Nestor,* 363 U. S. 603, 617 (1960)). In *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144, 168–169 (1963), we set forth a list of considerations that has proved helpful in the past in making such determinations.[7] See, *e. g., United States* v. *Ward, supra,* at 249–251; *Bell* v. *Wolfish,* 441 U. S. 520, 537–538 (1979).

Only one of the *Mendoza-Martinez* factors—whether or not the proscribed behavior is already a crime—lends any support to Mulcahey's position that § 924(d) imposes a criminal penalty. The fact that actions giving rise to forfeiture proceedings under § 924(d) may also entail the criminal penalties of § 922(a)(1) admittedly suggests that § 924(d) is criminal in nature. But that indication is not as strong as it might seem at first blush. *United States* v. *Ward, supra,* at 250. Clearly "Congress may impose both a criminal and a civil sanction in respect to the same act or omission," *Helvering* v. *Mitchell,* 303 U. S., at 399; indeed, it has done so on other occasions. Moreover, Congress in fact drafted § 924(d) to cover a broader range of conduct than is proscribed by the criminal provisions of § 922(a)(1). See *supra*, at 363–364. Because the sanction embodied in § 924(d) is not limited to criminal misconduct, the forfeiture remedy cannot be said to be coextensive with the criminal penalty. What overlap there is between the two sanctions is not sufficient to persuade us that the forfeiture proceeding may not legitimately be viewed as civil in nature.

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[7] In *Kennedy* v. *Mendoza-Martinez,* the Court enumerated "the tests traditionally applied to determine whether an Act of Congress is penal or regulatory in character." 372 U. S., at 168.

"Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter,* whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions." *Id.,* at 168–169 (footnotes omitted).

This list of considerations is, however, "neither exhaustive nor dispositive." *United States* v. *Ward,* 448 U. S. 242, 249 (1980).

In short, an analysis of the *Mendoza-Martinez* factors in no way undermines Congress' classification of the § 924(d) forfeiture action as a civil sanction. Mulcahey has failed to establish by the "clearest proof" that Congress has provided a sanction so punitive as to "transfor[m] what was clearly intended as a civil remedy into a criminal penalty." *Rex Trailer Co.* v. *United States*, 350 U. S. 148, 154 (1956). We accordingly conclude that the forfeiture mechanism set forth in § 924(d) is not an additional penalty for the commission of a criminal act, but rather is a separate civil sanction, remedial in nature. Because the § 924(d) forfeiture proceeding brought against Mulcahey's firearms is not a criminal proceeding, it is not barred by the Double Jeopardy Clause.

IV

We hold that a gun owner's acquittal on criminal charges involving firearms does not preclude a subsequent *in rem* forfeiture proceeding against those firearms under § 924(d). Neither collateral estoppel nor the Double Jeopardy Clause affords a doctrinal basis for such a rule of preclusion, and we reject today the contrary rationale of *Coffey* v. *United States*, 116 U. S. 436 (1886). The judgment of the United States Court of Appeals for the Fourth Circuit is accordingly reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

SOUTH CAROLINA *v.* REGAN, SECRETARY OF THE TREASURY

ON MOTION FOR LEAVE TO FILE COMPLAINT

No. 94, Orig. Argued October 5, 1983—Decided February 22, 1984

Section 103(a) of the Internal Revenue Code exempts from a taxpayer's gross income the interest earned on the obligations of any State. Section 103 was amended by the Tax Equity and Fiscal Responsibility Act of 1982, which added a new provision, § 103(j)(1), to the Internal Revenue Code. Section 103(j)(1) requires that "registration-required obligation[s]" be issued in registered, rather than bearer, form to qualify for the § 103(a) exemption. If a registration-required obligation is issued in bearer, rather than registered, form, § 103(j)(1) provides that the interest is taxable. South Carolina asks leave to file a complaint against the Secretary of the Treasury, seeking injunctive and other relief on the ground that § 103(j)(1) is invalid as violative of the Tenth Amendment and the doctrine of intergovernmental tax immunity. The Secretary argues that the action is barred by the Anti-Injunction Act, which provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed."

Held: The motion for leave to file the complaint is granted.

JUSTICE BRENNAN delivered the opinion of the Court with respect to Parts I and II, concluding that the Anti-Injunction Act does not bar the action. Pp. 373–381.

(a) The Act's purposes and the circumstances of its enactment indicate that it does not apply to actions brought by aggrieved parties, such as South Carolina, for whom Congress has not provided an alternative forum in which to litigate their claims. Here, if South Carolina issues bearer bonds, its bondholders, by virtue of § 103(j)(1), will be liable for the tax on the interest earned on those bonds. South Carolina will incur no tax liability. Under these circumstances, the State will be unable to utilize any statutory procedure to contest the constitutionality of § 103(j)(1). Pp. 373–380.

(b) The indicia of congressional intent also demonstrate that Congress did not intend the Anti-Injunction Act to apply where an aggrieved party would be required to depend on the mere possibility of persuading a third party to assert his claims. The nature of the remedy proposed by the Secretary that the State may obtain judicial review of its claims by issuing bearer bonds and urging a purchaser of those bonds to bring a suit contesting the legality of § 103(j)(1), only buttresses the conclusion that the Act was not intended to apply to this kind of action. Reliance on such proposed remedy would create the risk that the Act would entirely deprive the State of any opportunity to obtain review of its claims. Pp. 380–381.

JUSTICE BRENNAN, joined by CHIEF JUSTICE BURGER, JUSTICE WHITE, and JUSTICE MARSHALL, concluded in Part III that since the manner in which a State may exercise its borrowing power is a question of vital importance to all States, it is appropriate for this Court to exercise its discretion in favor of hearing this case. But since the record is presently not sufficiently developed to permit the merits to be addressed, a Special Master will be appointed to develop the record. Pp. 381–382.

JUSTICE BLACKMUN concluded that because the suit is not one "for the purpose of restraining the assessment or collection of any tax," the Anti-Injunction Act is no bar to South Carolina's ability to bring the suit in another court. Nevertheless, because the issue presented is substantial and of concern to a number of States, and because prompt resolution of the issue in this Court will benefit all concerned, the grant of leave to file is a proper exercise of the Court's discretion. P. 384.

JUSTICE O'CONNOR, joined by JUSTICE POWELL and JUSTICE REHNQUIST, concluded that, although great deference is due the congressional policy against premature judicial interference with federal taxes, it is proper to exercise this Court's original jurisdiction where South Carolina has demonstrated injury of "serious magnitude" and that it has no adequate alternative forum in which to raise its unique claims. Pp. 400–402.

BRENNAN, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I and II, in which BURGER, C. J., and WHITE, MARSHALL, and STEVENS, JJ., joined, and an opinion with respect to Part III, in which BURGER, C. J., and WHITE and MARSHALL, JJ., joined. BLACKMUN, J., filed an opinion concurring in the judgment, *post*, p. 382. O'CONNOR, J., filed an opinion concurring in the judgment, in which POWELL and REHNQUIST, JJ., joined, *post*, p. 384. STEVENS, J., filed an opinion concurring in part and dissenting in part, *post*, p. 403.

Huger Sinkler argued the cause for plaintiff. With him on the briefs were *Karen LeCraft Henderson*, *T. Travis*

Medlock, Attorney General of South Carolina, *C. Tolbert Goolsby, Jr.*, Chief Deputy Attorney General, and *David C. Eckstrom* and *Grady L. Patterson III*, Assistant Attorneys General.

Susan Lee Voss, Assistant Attorney General of Texas, argued the cause for the State of Texas et al. as *amici curiae*. With her on the brief were *Jim Mattox*, Attorney General of Texas, *David R. Richards*, Executive Assistant Attorney General, and *Robert T. Lewis* and *Michael Cafiso*, Assistant Attorneys General, and the Attorneys General for their respective States as follows: *Norman C. Gorsuch* of Alaska, *Robert K. Corbin* of Arizona, *Michael J. Bowers* of Georgia, *Linley E. Pearson* of Indiana, *Thomas J. Miller* of Iowa, *William J. Guste, Jr.*, of Louisiana, *Stephen H. Sachs* of Maryland, *William A. Allain* of Mississippi, *John D. Ashcroft* of Missouri, *Michael T. Greely* of Montana, *Brian McKay* of Nevada, *Gregory H. Smith* of New Hampshire, *Rufus L. Edmisten* of North Carolina, *Robert Wefald* of North Dakota, *Anthony Celebrezze* of Ohio, *Michael K. Turpin* of Oklahoma, *LeRoy S. Zimmerman* of Pennsylvania, *Dennis J. Roberts II* of Rhode Island, *William L. Leech, Jr.*, of Tennessee, *John J. Easton, Jr.*, of Vermont, *Gerald L. Baliles* of Virginia, *Bronson C. La Follette* of Wisconsin, and *Archie G. McClintock* of Wyoming.

Deputy Solicitor General Claiborne argued the cause for defendant. With him on the briefs were *Solicitor General Lee, Assistant Attorney General Archer, Stuart A. Smith, Michael L. Paup*, and *Ernest J. Brown*.*

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*Briefs of *amici curiae* were filed for the City of Baltimore et al. by *Benjamin Brown, J. Lamar Shelley, John W. Witt, Roger F. Cutler, Roy D. Bates, George Agnost, Robert J. Alfton, Mark Aronchick, James K. Baker, James P. McGuire, Clifford D. Pierce, Jr., William H. Taube, William I. Thornton, Jr., Henry W. Underhill, Jr.*, and *Charles S. Rhyne;* and for the National Association of Counties et al. by *Lawrence R. Velvel* and *Dennis A. Dutterer.*

JUSTICE BRENNAN delivered the opinion of the Court.†

South Carolina invokes the Court's original jurisdiction[1] and asks leave to file a complaint against Donald T. Regan, the Secretary of the Treasury of the United States. The State seeks an injunction and other relief, on the ground that § 103(j)(1) of the Internal Revenue Code of 1954, 26 U. S. C. § 103(j)(1) (1982 ed.), as added by § 310(b)(1) of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. 97–248, 96 Stat. 596, is constitutionally invalid as violative of the Tenth Amendment and the doctrine of intergovernmental tax immunity.

The Secretary objects to the motion on the ground that the Anti-Injunction Act, 26 U. S. C. § 7421(a), bars this action[2] and, alternatively, that the Court should exercise its discretion to deny leave to file. We are not persuaded that either is a ground for denying the motion, and therefore grant the motion for leave to file the complaint.

I

Section 103(a) of the Internal Revenue Code (IRC) exempts from a taxpayer's gross income the interest earned on the obligations of any State.[3] In 1982, however, as part of

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†Part III of the opinion is joined only by THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE MARSHALL.

[1] U. S. Const., Art. III, § 2; 28 U. S. C. § 1251(b).

[2] Defendant also argues that the Court may not grant declaratory relief because the Declaratory Judgment Act, 28 U. S. C. § 2201 (1982 ed.), which authorizes "any court of the United States" to issue a declaratory judgment in an appropriate case, excepts from its coverage most actions "with respect to Federal taxes." Because of our disposition of the case, we need not decide at this time whether we may grant declaratory relief should plaintiff prevail on the merits.

[3] IRC § 103(a) provides in pertinent part:

"(a) General rule

"Gross income does not include interest on—

"(1) the obligations of a State, a Territory, or a possession of the United States, or any political subdivision of any of the foregoing, or of the District of Columbia . . . ."

TEFRA, Congress amended § 103 to restrict the types of bonds that qualify for the tax exemption granted by that section. Specifically, § 310(b)(1) of TEFRA added a new provision, § 103(j)(1), to the Code. Section 103(j)(1) requires that certain obligations, termed "registration-required obligation[s]," be issued in registered,[4] rather than bearer, form to qualify for the § 103(a) exemption.[5] For purposes of § 103 (j)(1), registration-required obligations are defined broadly to include most publicly issued obligations with maturities greater than one year.[6] If an obligation that is registration-required is issued in bearer, rather than registered, form, then § 103(j)(1) provides that the interest on that obligation is taxable.

Because the imposition of a tax on bearer bonds would require a State to pay its bondholders a higher rate of interest on such bonds, South Carolina argues that the practical effect of § 103(j)(1) is to require it to issue its obligations in registered form. For that reason, South Carolina argues that the section destroys its freedom to issue obligations in the form that it chooses. Viewing its borrowing power as essential to the maintenance of its separate and independent existence, South Carolina contends that the condition imposed by § 103 (j)(1) on the exercise of that power violates the Tenth Amendment. In addition, relying on *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429 (1895), South Carolina argues that Congress may not tax the interest earned on the obligations of a State. Because § 103(j)(1) imposes a tax on the interest earned on state obligations issued in bearer form, the State argues that the section is unconstitutional. Accordingly, South Carolina asks that its motion to file the complaint be granted and that this Court award declaratory, injunctive, and other appropriate relief.[7]

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[4] Temporary Regulation § 5f.103–1 provides:

"An obligation is in registered form if —

"(i) The obligation is registered as to both principal and any stated interest and transfer of the obligation may be effected only by the surrender of the old instrument and either the reissuance by the issuer of the old instrument to the new holder or the issuance by the issuer of a new instrument to the new holder, or

"(ii) The right to the principal of, and stated interest on, the obligation may be transferred only through a book entry system (as described in paragraph (c)(2) of this section)." 26 CFR § 5f.103–1 (1983).

[5] Section 103(j)(1) provides as follows:

"(j) Obligations must be in registered form to be tax-exempt

"(1) In general

"Nothing in subsection (a) or in any other provision of law shall be construed to provide an exemption from Federal income tax for interest on any registration-required obligation unless the obligation is in registered form."

[6] Section 103(j)(2) defines a registration-required obligation as any obligation other than an obligation that "(A) is not of a type offered to the public, (B) has a maturity (at issue) of not more than 1 year, or (C) is described in section 163(f)(2)(B)."

The Secretary does not address the merits of the State's constitutional claims. Rather, he argues that we may not grant the motion to file because this action is barred by the Anti-Injunction Act. The Act provides, in pertinent part, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed."[8] Characterizing this action as a suit to "restrai[n] the assessment or collection of" a tax, the Secretary contends that this suit is barred by the statute. The Secretary argues that *Enochs* v. *Williams Packing & Navigation Co.*, 370 U. S. 1 (1962), establishes the single judicially created exception to the Act and that this action does not fall within that exception. We need not address whether this case falls within the *Williams Packing* exception for we hold that the Act was not intended to bar an action where, as here, Congress has not provided the plaintiff with an alternative legal way to challenge the validity of a tax.[9]

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[7] Since we have decided to appoint a Special Master to develop a factual record, see *infra*, at 382, we express no opinion on the merits of the State's claims.

[8] The full text of the Act reads:

"Except as provided in sections 6212(a) and (c), 6213(a), 6672(b), 6694(c), 7426(a) and (b) (1), and 7429(b), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." IRC § 7421(a).

None of the statutory exceptions is relevant in this case.

II

When enacted in 1867, the forerunner of the current Anti-Injunction Act provided that "no suit for the purpose of restraining the assessment or collection of tax shall be maintained in any court." Act of Mar. 2, 1867, § 10, 14 Stat. 475.[10] Although the Act apparently has no recorded legislative history, *Bob Jones University* v. *Simon,* 416 U. S. 725, 736 (1974), the circumstances of its enactment strongly suggest that Congress intended the Act to bar a suit only in situations in which Congress had provided the aggrieved party with an alternative legal avenue by which to contest the legality of a particular tax.

The Act originated as an amendment to a statute that provided that

> "[n]o suit shall be maintained in any court for the recovery of any tax alleged to have been erroneously or illegally assessed or collected, until appeal shall have been duly made to the commissioner of internal revenue . . . and a decision of said commissioner shall be had thereon, unless such suit shall be brought within six months from the time of said decision . . . ." Internal Revenue Act of July 13, 1866, § 19, 14 Stat. 152.

The Anti-Injunction Act amended this statute by adding the prohibition against injunctions. Act of Mar. 2, 1867, § 10, 14

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[9] Because of our disposition of the statutory issue, we need not reach the State's contention that application of the Act to bar this suit would unconstitutionally restrict this Court's original jurisdiction.

[10] In the revised statutes, the term "any" was added so that the statute read: "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." *Snyder* v. *Marks,* 109 U. S. 189, 192 (1883). This language appears in the current version of the Act.

Stat. 475. The Act, therefore, prohibited injunctions in the context of a statutory scheme that provided an alternative remedy. As we explained in *Snyder* v. *Marks*, 109 U. S. 189, 193 (1883), "[t]he remedy of a suit to recover back the tax after it is paid is provided by statute, and a suit to restrain its collection is forbidden." This is cogent evidence that the 1867 amendment was merely intended to require taxpayers to litigate their claims in a designated proceeding.

The Secretary argues that, regardless of whether other remedies are available, a plaintiff may only sue to restrain the collection of taxes if it satisfies the narrow exception to the Act enunciated in *Williams Packing, supra. Williams Packing* did not, however, ever address, let alone decide, the question whether the Act applies when Congress has provided no alternative remedy. Indeed, as we shall see, a careful reading of *Williams Packing* and its progeny supports our conclusion that the Act was not intended to apply in the absence of such a remedy.

Williams Packing was a taxpayer's suit to enjoin the District Director of the Internal Revenue Service from collecting allegedly past-due social security and unemployment taxes. The Court concluded that the Anti-Injunction Act would not apply if the taxpayer (1) was certain to succeed on the merits, and (2) could demonstrate that collection would cause him irreparable harm. 370 U. S., at 6–7. Finding that the first condition had not been met, the Court concluded that the Act barred the suit. Significantly, however, Congress had provided the plaintiff in *Williams Packing* with the alternative remedy of a suit for a refund. *Id.*, at 7.

In each of this Court's subsequent cases that have applied the *Williams Packing* rule, the plaintiff had the option of paying the tax and bringing a suit for a refund. Moreover, these cases make clear that the Court in *Williams Packing* and its progeny did not intend to decide whether the Act would apply to an aggrieved party who could not bring a suit for a refund.

For example, in *Bob Jones*, *supra*, the taxpayer sought to prevent the Service from revoking its tax-exempt status under IRC § 501(c)(3). Because the suit would have restrained the collection of income taxes from the taxpayer and its contributors, as well as the collection of federal social security and unemployment taxes from the taxpayer, the Court concluded that the suit was an action to restrain "the assessment or collection of any tax" within the meaning of the Anti-Injunction Act. 416 U. S., at 738–739. Applying the *Williams Packing* test, the Court found that the Act barred the suit because the taxpayer failed to demonstrate that it was certain to succeed on the merits. 416 U. S., at 749. In rejecting the taxpayer's challenge to the Act on due process grounds, however, the Court relied on the availability of a refund suit, noting that "our conclusion might well be different" if the aggrieved party had no access to judicial review. *Id.*, at 746. Similarly, the Court left open the question whether the Due Process Clause would be satisfied if an organization had to rely on a "friendly donor" to obtain judicial review of the Service's revocation of its tax exemption. *Id.*, at 747, n. 21.[11]

In addition, in *Alexander* v. *"Americans United" Inc.*, 416 U. S. 752 (1974), decided the same day as *Bob Jones*, the Court considered a taxpayer's action to require the Service to reinstate its tax-exempt status.[12] The Court applied the *Williams Packing* test and held that the action was barred by the Act. Finally, in *United States* v. *American Friends Service Committee*, 419 U. S. 7 (1974) *(per curiam)*, the taxpayers sought to enjoin the Government from requiring that a portion of their wages be withheld. The taxpayers argued that the withholding provisions violated their First Amendment right to bear witness to their religious beliefs. The Court again applied the *Williams Packing* rule and found that the suit was barred by the Anti-Injunction Act. In both of these cases, the taxpayers argued that the *Williams Packing* test was irrelevant and the Act inapplicable because they did not have adequate alternative remedies. In rejecting this argument, the Court expressly relied on the availability of refund suits. 416 U. S., at 761; 419 U. S., at 11. This emphasis on alternative remedies would have been irrelevant had the Court meant to decide that the Act applied in the absence of such remedies. We therefore turn to that question.

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[11] A "friendly donor" suit is a suit in which a donor claims that his contributions to an organization should be tax deductible because the organization's tax-exempt status had been revoked improperly.

[12] In *"Americans United,"* the IRS had revoked the organization's § 501(c)(3) status, but found that it was eligible for § 501(c)(4) status. Although the organization's income remained tax exempt, "[t]he effect of this change in status was to render respondent liable for unemployment (FUTA) taxes under Code § 3301, 26 U. S. C. § 3301, and to destroy its eligibility for tax deductible contributions under § 170." 416 U. S., at 755 (footnote omitted).

The analysis in *Williams Packing* and its progeny of the purposes of the Act provides significant support for our holding today. *Williams Packing* expressly stated that the Act was intended to protect tax revenues from judicial interference "*and to require that the legal right to the disputed sums be determined in a suit for refund.*" 370 U. S., at 7 (emphasis added). Similarly, the Court concluded that the Act was also designed as "protection of the collector from litigation *pending a suit for refund,*" *id.*, at 7–8 (emphasis added). The Court's concerns with protecting the expeditious collection of revenue and protecting the collector from litigation were expressed in the context of a procedure that afforded the taxpayer the remedy of a refund suit.[13]

Nor is our conclusion inconsistent with the 1966 amendment to the Anti-Injunction Act. In 1966, in § 110(c) of the Federal Tax Lien Act, Pub. L. 89–719, 80 Stat. 1144, Congress amended the Anti-Injunction Act to read, in pertinent part, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." *Ibid.* The central focus of the added phrase, "by any person, whether or not such person is the person against whom such tax was assessed," was on third parties whose property rights competed with federal tax liens. *Bob Jones*, 416 U. S., at 732, n. 6. Prior to the adoption of the Tax Lien Act, such parties were often unable to protect their property interests. *Ibid.*; H. R. Rep. No. 1884, 89th Cong., 2d Sess., 27–28 (1966).[14] Section 110(a) of the Tax Lien Act gave such third parties a right of action against the United States.[15] The amendment to the Anti-Injunction Act was primarily designed to insure that the right of action granted by § 110(a) of the Federal Tax Lien Act was exclusive. 416 U. S., at 732, n. 6. The language added to the Anti-Injunction Act by the 1966 amendment is, therefore, largely irrelevant to the issue before us today.[16]

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[13] Unlike JUSTICE O'CONNOR, we do not believe that Congress' concerns with judicial interference overrode all other concerns. This case is difficult because it implicates Congress' concern with providing remedies as well as its concern with limiting remedies.

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[14] Any dicta in *Bob Jones* suggesting that, prior to the enactment of the Tax Lien Act, the Anti-Injunction Act barred suits by third parties claiming that a federal tax lien impaired their property rights may be disregarded. 416 U. S., at 732, n. 6. The Anti-Injunction Act had been widely construed not to apply to such actions. See, *e. g.*, *Campbell* v. *Bagley*, 276 F. 2d 28 (CA5 1960); *Tomlinson* v. *Smith*, 128 F. 2d 808 (CA7 1942); American Bar Association, Final Report of the Committee on Federal Liens, pp. 48, 116, reprinted in Hearings on H. R. 11256 and H. R. 11290 before the House Committee on Ways and Means, 89th Cong., 2d Sess., 125, 192 (1966).

[15] Section 110(a), codified at 26 U. S. C. § 7426, provides in pertinent part:

"If a levy has been made on property or property has been sold pursuant to a levy, and any person (other than the person against whom is assessed the tax out of which such levy arose) who claims an interest in or lien on such property and that such property was wrongfully levied upon may bring a civil action against the United States in a district court of the United States."

[16] In *Bob Jones*, we held that the 1966 amendment did not merely limit the remedies of third parties challenging federal tax liens. Rather, the

In sum, the Anti-Injunction Act's purpose and the circumstances of its enactment indicate that Congress did not intend the Act to apply to actions brought by aggrieved parties for whom it has not provided an alternative remedy.[17] In this

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amendment was also intended as a reaffirmation of the plain language of the Act. 416 U. S., at 732, n. 6. In that sense, we found the statute to be "declaratory" rather than "innovative." *Ibid.* Because the Act, as originally enacted, did not cover third parties who were not given an alternative action in which to press their claims, our construction of the 1966 amendment in *Bob Jones* is entirely consistent with our holding today.

Similarly, we stated in "*Americans United*" that "a suit to enjoin the assessment or collection of anyone's taxes triggers the literal terms" of the Act. 416 U. S., at 760. Of course, this statement was meant to apply only if the aggrieved party has an alternative remedy.

JUSTICE O'CONNOR relies heavily on Assistant Treasury Secretary Surrey's statement to the House Ways and Means Committee to support her view that the 1966 amendment to the Anti-Injunction Act was intended to prohibit third parties from suing to restrain the collection of taxes regardless of whether Congress has provided them with an alternative remedy. *Post*, at 389–390. This reliance is misplaced.

Although the Assistant Secretary described the amendment as a restriction on third-party suits, when read in context, it is unclear whether he was referring to all third parties, including those without alternative remedies, as JUSTICE O'CONNOR believes, or only to those third parties who were granted a right of action by § 110(a) of the Federal Tax Lien Act. See Statement by the Hon. Stanley S. Surrey, Assistant Secretary of the Treasury, reprinted in Hearings on H. R. 11256 and H. R. 11290, *supra*, at 58.

Even if Assistant Secretary Surrey viewed the 1966 amendment as prohibiting suits by third parties who had no alternative remedies, there is nothing in the legislative history of that amendment to support the view that Congress shared that belief. JUSTICE O'CONNOR relies on the statements in the House and Senate Reports that " '[u]nder present law . . . the United States cannot be sued by third persons where its collection activities interfere with their property rights,' " *post*, at 389, quoting H. R. Rep. No. 1884, 89th Cong., 2d Sess., 27 (1966); S. Rep. No. 1708, 89th Cong., 2d Sess., 29 (1966). Since the Anti-Injunction Act had been widely construed not to bar such suits, see n. 14, *supra*, however, this statement simply could not have been intended as a description of the effect of that Act.

[17] As the Secretary notes, IRC § 7478 does not provide plaintiff with an action in which it may contest the constitutionality of § 103(j)(1). That sec-

case, if the plaintiff South Carolina issues bearer bonds, its bondholders will, by virtue of § 103(j)(1), be liable for the tax on the interest earned on those bonds. South Carolina will

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tion permits the Tax Court to "make a declaration whether . . . prospective obligations are *described* in § 103(a)." The issue in this case involves the constitutionality of § 103(j)(1), not whether the bonds that the State desires to issue are "described in section 103." Therefore, § 7478 does not provide the State with an alternative procedure to contest the legality of § 103(j)(1).

JUSTICE O'CONNOR relies on statements in the legislative history of IRC § 7478 indicating that Congress believed that, prior to the enactment of that section, prospective issuers of state and local bonds had no means to determine whether the interest on their bonds would be tax exempt. *Post*, at 391–392. In her view, these statements are strong evidence that Congress intended the Anti-Injunction Act to apply regardless of the availability of an alternative remedy.

We find these statements unpersuasive. To the extent that these statements, which do not even refer to the Anti-Injunction Act, may be read as expressing the view that the Act should be construed to bar suits regardless of the availability of alternative remedies, they are the views of a subsequent Congress and, therefore, at best, " 'form a hazardous basis for inferring the intent of an earlier one.' " *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 117 (1980), quoting *United States* v. *Price*, 361 U. S. 304, 313 (1960).

JUSTICE O'CONNOR, relying on *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 380–381 (1969), and *FHA* v. *The Darlington, Inc.*, 358 U. S. 84, 90 (1958), argues that these statements should be given " 'great weight' " in construing the Anti-Injunction Act. This reliance is misplaced. In *Red Lion* we stated that "[s]ubsequent *legislation* declaring the intent of an earlier statute is entitled to great weight." 395 U. S., at 380 (emphasis added). *The Darlington* stands for the same proposition. We have previously rejected the argument that the *Red Lion* rule should be applicable to the Committee Reports that accompany subsequent legislation. In *Consumer Product Safety Comm'n, supra*, at 118, n. 13, we stated: "With respect to subsequent *legislation* . . . Congress has proceeded formally through the legislative process. A mere statement in a conference report of such legislation as to what the Committee believes an earlier statute meant is obviously less weighty."

Indeed, JUSTICE O'CONNOR does not consistently accord "great weight" to the legislative history of § 7478. In Part I of her opinion, she states that the legislative history of § 7478 represents Congress' "belief that the Tax incur no tax liability. Under these circumstances, the State will be unable to utilize any statutory procedure to contest the constitutionality of § 103(j)(1). Accordingly, the Act cannot bar this action.

The Secretary suggests that the State may obtain judicial review of its claims by issuing bearer bonds and urging a purchaser of those bonds to bring a suit contesting the legality of § 103(j)(1). But the nature of this proposed remedy only buttresses our conclusion that the Act was not intended to apply to this kind of action. First, instances in which a third party may raise the constitutional rights of another are the exception rather than the rule. *Singleton* v. *Wulff*, 428 U. S. 106, 114 (1976). More important, to make use of this remedy the State "must first be able to find [an individual] willing to subject himself to the rigors of litigation against the Service, and then must rely on [him] to present the relevant arguments on [its] behalf." *Bob Jones*, 416 U. S., at 747, n. 21. Because it is by no means certain that the State would be able to convince a taxpayer to raise its claims,[18] reliance on the remedy suggested by the Secretary would create

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Anti-Injunction Act generally bars nontaxpayers from bringing the kind of injunctive action the State of South Carolina asks leave to file today." *Post*, at 392. Under this view, the statement in the Senate Report accompanying § 7478 that "present law does not allow the State . . . government to go to court," S. Rep. No. 95-1263, p. 150 (1978), must mean that Congress believed that the Anti-Injunction Act barred original actions in this Court as well as actions in lower courts. Yet, in reaching her conclusion that the Act does not apply to bar original actions in this Court, JUSTICE O'CONNOR apparently accords no weight at all to this legislative history. *Post*, at 399.

For similar reasons, we find the remaining postenactment history upon which JUSTICE O'CONNOR relies, *post*, at 390-391, to be unconvincing. Whatever the weight to which these statements are entitled, they are ultimately unpersuasive in light of the other evidence of congressional intent discussed above.

[18] It is not irrelevant that the IRS routinely audits the returns of taxpayers who litigate claims for refunds. U. S. Dept. of Treasury, Chief Counsel's Directives Manual (35)(17)50 (1982).

the risk that the Anti-Injunction Act would entirely deprive the State of any opportunity to obtain review of its claims. For these reasons, we should not lightly attribute to Congress an intent to require plaintiff to find a third party to contest its claims. Here, the indicia of congressional intent—the Act's purposes and the circumstances of its enactment—demonstrate that Congress did not intend the Act to apply where an aggrieved party would be required to depend on the mere possibility of persuading a third party to assert his claims. Rather, the Act was intended to apply only when Congress has provided an alternative avenue for an aggrieved party to litigate its claims on its own behalf.[19] Because Congress did not prescribe an alternative remedy for the plaintiff in this case, the Act does not bar this suit.

III

The Secretary argues that if we conclude that the Anti-Injunction Act is not a bar to this suit, we should in any event exercise our discretion to deny leave to file. He notes that the Court's jurisdiction over this suit is not exclusive and that the Court exercises its "original jurisdiction sparingly and [is] particularly reluctant to take jurisdiction of a suit where the plaintiff has another adequate forum in which to settle his claim." *United States* v. *Nevada*, 412 U. S. 534, 538 (1973) *(per curiam)*. The State has, however, alleged that the application of § 103(j)(1) will "materially interfere with and infringe upon the authority of South Carolina to borrow funds." Motion for Leave to File Complaint 16; see *supra*, at 371–372. Additionally, 24 States have jointly submitted an *amicus* brief urging this Court to grant the motion to file. Unquestionably, the manner in which a State may exercise its borrowing power is a question that is of vital importance to all 50 States. Under these circumstances, we believe that it is appropriate for us to exercise our discretion in favor of hearing this case. At present, however, the record is not sufficiently developed to permit us to address the merits. We shall therefore appoint a Special Master to develop the record.

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[19] JUSTICE O'CONNOR suggests that our holding today will enable taxpayers to evade the Anti-Injunction Act by forming organizations to litigate their tax claims. *Post*, at 386, 394. We disagree. Because taxpayers have alternative remedies, it would elevate form over substance to treat such organizations as if they did not possess alternative remedies. Accordingly, such organizations could not successfully argue that the Act does not apply because they are without alternative remedies.

JUSTICE O'CONNOR also appears to suggest that our holding today renders the Act a restatement of the equitable principles governing the issuance of injunctions at the time the statute was enacted. *Post*, at 388, n. 5. This argument is without merit since these equitable principles did not require that injunctions issue only when no alternative remedy was available. See, *e. g.*, *Dows* v. *Chicago*, 11 Wall. 108, 109–110 (1871) (suit to restrain collection of taxes will lie if plaintiff shows that enforcement will cause irreparable harm or lead to a multiplicity of suits); *Hannewinkle* v. *Georgetown*, 15 Wall. 547, 548–549 (1873) (same).

Accordingly, plaintiff's motion for leave to file a complaint is granted and a Special Master will be appointed.

It is so ordered.

JUSTICE BLACKMUN, concurring in the judgment.

I, too, agree with all those who have written opinions in this case that the Anti-Injunction Act, 26 U. S. C. § 7421(a), is no bar to the ability of the State of South Carolina to invoke the original jurisdiction of this Court in order to challenge the validity of a federal tax statute. Like JUSTICE O'CONNOR, I have reservations about the breadth of the approach taken by JUSTICE BRENNAN in determining that Congress did not intend the Act to apply in any case in which the aggrieved party has no alternative avenue by which to contest the legality of a particular tax.

In *Bob Jones University* v. *Simon*, 416 U. S. 725 (1974), the Court stressed the broad sweep of the Anti-Injunction Act. The Court noted that the language added in 1966, prohibiting any suit for the purpose of restraining the assessment or collection of any tax "by any person, whether or not such person is the person against whom such tax was assessed," see § 110(c) of the Federal Tax Lien Act of 1966, Pub. L. 89–719, 80 Stat. 1144, was intended as a "reaffirmation of the plain meaning" of the Act as it had stood since 1867. See 416 U. S., at 731–732, n. 6. See also *Alexander* v. *"Americans United" Inc.*, 416 U. S. 752, 760, n. 11 (1974). The Court in *Bob Jones* rejected the petitioner's efforts to rely on exceptions to the reach of the Act suggested in the 1930's for situations in which there is no adequate remedy short of a suit to enjoin the challenged tax. See 416 U. S., at 744. Because it concluded that the plaintiffs in *Bob Jones* and *"Americans United"* had access to judicial forums in which to challenge the alleged deprivations of their property, the Court did not need to decide whether and under what circumstances its broad reading of the Anti-Injunction Act might deny an aggrieved party due process of law. 416 U. S., at 746.

Unlike JUSTICE O'CONNOR, I see no need to decide whether Congress intended the Anti-Injunction Act to apply to suits invoking this Court's original jurisdiction. I would decide this case on the narrower ground set forth in my dissenting opinion in *"Americans United,"* 416 U. S., at 763. I there expressed concern that the Court was overlooking a necessary first step in applying the Anti-Injunction Act, that is, the determination whether the litigation is a " 'suit for the purpose of restraining' " any tax. *Id.*, at 767, quoting 26 U. S. C. § 7421(a). Here, as in *"Americans United,"* there can be no serious argument that the disposition of South Carolina's claim will have much effect, if any at all, upon federal tax revenues. If South Carolina loses, it will register its securities.* If it wins, it will continue to issue unregistered securities. In either event, the Federal Government will receive no more tax revenues from purchasers of such securities than it has enjoyed since *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, was decided in 1895.

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*According to the affidavit of the Treasurer of South Carolina, the issuance of registered bonds will increase South Carolina's interest costs by 0.25%. If the State were to continue to issue unregistered bonds, in the face of a ruling that § 103(j)(1) is valid, it estimates that it would have to pay between 3% and 5% more interest on its bonds to render them marketable. Counsel for South Carolina acknowledged at oral argument that since the effective date of § 103(j)(1) the State has issued fully registered bonds. Tr. of Oral Arg. 11.

The acknowledged purpose of Congress in enacting § 310 (b)(1) of TEFRA in 1982 so as to add a new § 103(j) to the Internal Revenue Code of 1954 was to encourage the States to issue securities in registered form. See Staff of Joint Committee on Taxation, General Explanation of the Revenue Provisions of the Tax Equity and Fiscal Responsibility Act of 1982, 97th Cong., 2d Sess., 190 (Comm. Print 1982). In a case such as this, where it is evident that the challenged governmental action is one to "accomplish a broad-based policy objective" rather than to produce revenue, see "*Americans United*," 416 U. S., at 771 (dissenting opinion), and the disposition of the challenge will have no effect on federal revenues, I conclude that the suit is not one "for the purpose of restraining the assessment or collection of any tax," within the words of § 7421(a).

Although I would not hold the Anti-Injunction Act to be a bar to South Carolina's ability to bring this suit in another court, I agree that we should hear this case. Exercise of our original jurisdiction is discretionary and, though the Court has exercised it sparingly, we are not prohibited from doing so by the fact that the original party may have an alternative forum. See *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 465 (1945). The issue presented is a substantial one, and is of concern to a number of States. I am satisfied that prompt resolution of the issue here will benefit all concerned and that the decision to grant leave to file is a proper exercise of our discretion.

JUSTICE O'CONNOR, with whom JUSTICE POWELL, and JUSTICE REHNQUIST join, concurring in the judgment.

The motion of South Carolina for leave to file a complaint in our original jurisdiction raises three questions. First, the Court must decide whether Congress intended by the

Tax Anti-Injunction Act, 26 U. S. C. § 7421(a), to bar nontaxpayers like the State of South Carolina from challenging the validity of federal tax statutes in the courts. Second, if the Act generally does bar such nontaxpayer suits, the Court must decide whether Congress intended, and if so whether the Constitution permits it, to bar us from considering South Carolina's complaint in our original jurisdiction. Third, if Congress either did not intend or constitutionally is not permitted to withdraw this case from our original jurisdiction, the Court must decide whether South Carolina's challenge to the constitutionality of § 103(j)(1) of the Internal Revenue Code of 1954, 26 U. S. C. § 103(j)(1) (1982 ed.), as added by § 310(b)(1) of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. 97–248, 96 Stat. 596, raises issues appropriate for original adjudication.

In answering the first question, the Court reaches the unwarranted conclusion that the Tax Anti-Injunction Act proscribes only those suits in which the complaining party, usually a taxpayer, can challenge the validity of a taxing measure in an alternative forum. The Court holds that suits by nontaxpayers generally are not barred. In my opinion, the Court's interpretation fundamentally misconstrues the congressional anti-injunction policy. Accordingly, I cannot join its opinion.

I

A

The Tax Anti-Injunction Act provides, in pertinent part, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." 26 U. S. C. § 7421(a). The Act's language "could scarcely be more explicit" in prohibiting nontaxpayer suits like this one, *Bob Jones University* v. *Simon*, 416 U. S. 725, 736 (1974), since the suit indisputably would have the purpose and effect of restraining taxes. See *id.*, at 738–742. The Act plainly bars not only "a taxpayer's attempt to enjoin the collection of his own taxes, . . ." but also "a suit to enjoin the assessment or collection of anyon[e] [else's] taxes . . . ." *Alexander* v. *"Americans United" Inc.*, 416 U. S. 752, 760 (1974). Though the Internal Revenue Code (Code) contains a few exceptions to this nearly complete ban,[1] for the most part Congress has restricted the judicial role to resolution of concrete disputes over specific sums of money, either by way of a deficiency proceeding in the Tax Court, see 26 U. S. C. §§ 6212, 6213, or by way of a taxpayer's suit for refund, see 26 U. S. C. §§ 6532, 7422.

In depriving courts of jurisdiction to resolve abstract tax controversies, Congress has determined that the United States must be able "to assess and collect taxes alleged to be due without judicial intervention . . . ." *Enochs* v. *Williams Packing & Navigation Co.*, 370 U. S. 1, 7 (1962). "[T]axes are the life-blood of government," *Bull* v. *United States*, 295 U. S. 247, 259 (1935), and the anti-injunction prohibition is Congress' recognition that "the tenacity of the American taxpayer" constantly threatens to drain the Nation of a life-sustaining infusion of revenues. See Gorovitz, Federal Tax Injunctions and the Standard Nut Cases, 10 Taxes 446, 446 (1932). The Act's proscription literally extends to nontaxpayer as well as taxpayer suits, if only to prevent taxpayers from sidestepping the anti-injunction policy by bringing suit through nontaxpaying associations of taxpayers.[2]

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[1] See *infra*, at 390–392 (describing some exceptions); see also 26 U. S. C. §§ 6694(c), 7429(b).

[2] Nontaxpaying associations of taxpayers and nontaxpayer organizations previously have attempted to avoid the congressional policy against judicial resolution of abstract tax controversies. See, *e. g.*, *Investment Annuity, Inc.* v. *Blumenthal*, 197 U. S. App. D. C. 235, 609 F. 2d 1 (1979) (insurers seeking declaration that certain investment annuity contracts are eligible for favorable tax treatment); *Educo, Inc.* v. *Alexander*, 557 F. 2d 617 (CA7 1977) (company engaged in designing and administering educational benefit plans for corporate employees sues to protect its clients' tax benefits); *Cattle Feeders Tax Committee* v. *Shultz*, 504 F. 2d 462 (CA10 1974) (unincorporated association representing participants in tax shelter cattle feed program seeking injunction to prevent Treasury from disallowing certain

Moreover, by broadly precluding both taxpayer and nontaxpayer suits, the Act serves a collateral objective of protecting "the collector from litigation pending a suit for refund." *Enochs* v. *Williams Packing & Navigation Co.*, *supra*, at 7–8. The tax collector is an attractive target for all kinds of litigation, see, *e. g.*, *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U. S. 26 (1976), and the Act ensures that only Congress and the Treasury, not a host of private plaintiffs, will determine the focus of the collector's energies.

B

The Act's history expressly reflects the congressional desire that all injunctive suits against the tax collector be prohibited. First enacted in 1867,[3] it apparently was designed to protect the federal tax system from being inundated with the same type of injunctive suits that were then sweeping over the state tax systems. See *State Railroad Tax Cases*, 92 U. S. 575, 613 (1876); *Snyder* v. *Marks*, 109 U. S. 189, 193–194 (1883). There is little contemporaneous documentation,[4] but this Court's decisions indicate that the 39th Congress acted with a

> ". . . sense of . . . the evils to be feared if courts of justice could, in any case, interfere with the process of collect-

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year-end deductions); *McGlotten* v. *Connally*, 338 F. Supp. 448, 453, n. 25 (DC 1972) (nontaxpayer challenge to tax-exempt status of racially discriminatory fraternal organization), disapproved in *Bob Jones University* v. *Simon*, 416 U. S. 725, 732, and n. 6 (1974).

[3] See Act of Mar. 2, 1867, § 10, 14 Stat. 475.

[4] The Act was introduced on March 1, 1867, by Senator Fessenden, Chairman of the Senate Committee on Finance, as an amendment to a section which made a taxpayer appeal to the Commissioner of Internal Revenue a condition precedent to suit for the recovery of taxes. See Cong. Globe, 39th Cong., 2d Sess., 1933 (1867) (proposing amendment to the Act of July 13, 1866, ch. 184, § 19, 14 Stat. 152, presently codified at 26 U. S. C. § 6532(a)). The House initially objected to this amendment, see Cong. Globe, *supra*, at 1949, but the Senate would not recede, *id.*, at 1950. After a conference, the House agreed to the amendment. See *id.*, at 1968. No other recorded legislative history has been uncovered. See Note, En-

> ing the taxes on which the government depends for its continued existence." *State Railroad Tax Cases*, *supra*, at 613.

The experience in the States demonstrated the grave dangers which accompany intrusion of the injunctive power of the courts into the administration of the revenue:

> "If there existed in the courts . . . any general power of impeding or controlling the collection of taxes, or relieving the hardship incident to taxation, the very existence of the government might be placed in the power of a hostile judiciary." *Cheatham* v. *United States*, 92 U. S. 85, 89 (1876).

To avoid these evils and to safeguard the federal tax system, the 39th Congress committed administration of the Code to the discretion of the Secretary of the Treasury.[5]

This broad anti-injunction ban remained essentially untouched for almost a century.[6] In 1966, however, Congress

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joining the Assessment and Collection of Federal Taxes Despite Statutory Prohibition, 49 Harv. L. Rev. 109, and n. 9 (1935).

[5] The circumstances of the enactment do not, as the Court suggests, see *ante*, at 373–374, indicate that Congress meant to prohibit injunctions only where the statutory scheme provided an alternative remedy. Rather, "[s]ince equitable principles militating against the issuance of federal injunctions in tax cases existed independently of the Anti-Injunction Act, it is most unlikely that Congress would have chosen the stringent language of the Act if its purpose was merely to restate existing law and not to compel litigants to make use solely of the avenues of review opened by Congress." *Bob Jones University* v. *Simon*, 416 U. S. 725, 743, n. 16 (1974). "'Enacted in 1867, [the Anti-Injunction Act], for more than sixty years, [was] consistently applied as precluding relief, whatever the equities alleged.'" *Id.*, at 744, n. 18 (quoting *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498, 511 (1932) (Stone, J., dissenting)).

[6] In the revised statutes, the term "any" was added so that the statute read: "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." *Snyder* v. *Marks*, 109 U. S. 189, 192 (1883).

took steps to "reaffir[m] the plain meaning of the original language of the Act." *Alexander* v. *"Americans United" Inc.*, 416 U. S., at 760, and n. 11. In § 110(c) of the Federal Tax Lien Act, Pub. L. 89–719, 80 Stat. 1144, Congress amended the Act to emphasize that no injunctive action "*by any person, whether or not such person is the person against whom such tax was assessed*" could be maintained in the courts. *Ibid.* (emphasis added). The Treasury Department proposed the 1966 amendment, and its principal spokesperson, Assistant Secretary Surrey, testified:

> "Subsection (c) of section 110 of the bill amends section 7421(a) of the code. That section presently prohibits injunctions against the assessment or collection of tax. The cases decided under this provision raise a question as to whether this prohibition applies against actions by persons other than the taxpayer. New section 7426 will specifically allow actions by third parties to enjoin the enforcement of a levy or sale of property. The amendment to section 7421 makes clear that third parties may bring injunction suits only under the circumstances provided in new section 7426(b)(1) of the code." Statement by the Hon. Stanley S. Surrey, Assistant Secretary of the Treasury, reprinted in Hearings on H. R. 11256 and H. R. 11290, before the House Committee on Ways and Means, 89th Cong., 2d Sess., 58 (1966).

The House Committee on Ways and Means and the Senate Committee on Finance apparently shared Mr. Surrey's understanding of the rights of nontaxpayers under prior law, for their Reports both state:

> "Under present law, . . . the United States cannot be sued by third persons where its collection activities interfere with their property rights. This includes cases where the Government wrongfully levies on one person's property in attempting to collect from a taxpayer. However, some courts allow suits to be brought against

> district directors of Internal Revenue where this occurs." H. R. Rep. No. 1884, 89th Cong., 2d Sess., 27 (1966); S. Rep. No. 1708, 89th Cong., 2d Sess., 29 (1966).

To accommodate these conflicting rights, both Committees recommended that Congress enact § 7426, allowing "persons other than taxpayers" to bring suits against the United States to protect pre-existing liens on property levied upon by the Treasury, and amend § 7421(a) to forbid suits by all third persons, excepting those within the ambit of new § 7426. Congress followed the Committees' recommendations, on the understanding that the new language in § 7421(a) was "declaratory, not innovative." *Bob Jones University* v. *Simon*, 416 U. S., at 731–732, n. 6.[7]

Congress has since relaxed the statutory proscription against third-party suits on several occasions. For example, in 1974, it provided that certain designated persons could obtain declaratory judgments in the Tax Court with respect to the tax status of pension plans. See 26 U. S. C. § 7476. Similarly, in 1976, because "[u]nder [prevailing] law no court review of [Internal Revenue Service] ruling[s] [was] available," H. R. Conf. Rep. No. 94–1515, p. 463 (1976), Congress provided declaratory judgment procedures for determining the tax status of charitable organizations and of certain property transfers. See 26 U. S. C. §§ 7428, 7477; see also H. R. Conf. Rep. No. 94–1515, *supra*, at 523–524 ("Under present law, the Tax Court can hear declaratory judgment suits only on the tax status of employee retirement plans. In no other case may an individual or an organization seek a declaratory judgment as to an organization's tax-exempt status"). Finally, in 1978, in 26 U. S. C. § 7478 (1982 ed.), Congress provided a mechanism whereby state or local governments could seek declaratory judgments as to the tax status of proposed municipal bond issuances.[8] The relevant Senate Report noted:

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[7] I am at a complete loss to understand the Court's assertion that the "language added to the Anti-Injunction Act by the 1966 amendment is . . . largely irrelevant to the issue before us today." *Ante*, at 377. This conclusion follows only if the Court begins with a premise that it need pay no attention to either the 1966 amendment's language or its legislative history.

Similarly, I do not believe, as the Court apparently does, see *ante*, at 377, n. 14, 377–378, n. 16, that statements in *Bob Jones University* v. *Simon*, *supra*, to the effect that the Act bars third-party suits, can or should be "disregarded." Those statements were made after studious interpretation of both the original Act and its 1966 amendment. They reflect what I believe is the only faithful reading of the statute's language and history.

> "As a practical matter, there is no effective appeal from a Service private letter ruling (or failure to issue a private letter ruling) that a proposed issue of municipal bonds is taxable. In those cases, although there may be a real controversy between a State or local government and the Service, present law does not allow the State or local government to go to court. The controversy can be resolved only if the bonds are issued, a bondholder excludes interest on the bonds from income, the exclusion is disallowed, and the Service asserts a deficiency in its statutory notice of deficiency. This uncertainty coupled with the threat of the ultimate loss of the exclusion, invariably makes it impossible to market the bonds. In addition, it is impossible for a State or local government to question the Service rulings and regulations directly.
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> "[S]tate and local government[s] should have a right to court adjudication in the situation described above. The bill deals with the problem by providing . . . for a declaratory judgment as to the tax status of a pro-

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[8] Section 7478 does not directly apply to this case because it permits the Tax Court only to "make a declaration whether . . . prospective obligations are described in section 103(a)." The issue in this case involves the constitutionality of § 103(j)(1), not whether the bonds South Carolina desires to issue are "described in section 103(a)." Nevertheless, § 7478 demonstrates that Congress believed that, prior to the enactment of that section, prospective issuers had no means to determine whether the interest on their bonds would be tax exempt. See S. Rep. No. 95–1263, pp. 150–151 (1978).

> posed issue of municipal bonds." S. Rep. No. 95-1263, pp. 150-151 (1978).

The Conference Report reflects a similar view of prevailing law. See H. R. Conf. Rep. No. 95-1800, p. 240 (1978). Thus, in 1974, 1976, and again in 1978, Congress expressed its belief that the Tax Anti-Injunction Act generally bars nontaxpayers from bringing the kind of injunctive action the State of South Carolina asks leave to file today.[9]

These subsequently *enacted* provisions and the legislative understanding of them are entitled to "great weight" in construing earlier, related legislation. See, *e. g.*, *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 380-381 (1969); *FHA* v. *The Darlington, Inc.*, 358 U. S. 84, 90 (1958). Combined with the legislative purposes obviously motivating the 39th and 89th Congresses, these provisions conclusively demonstrate that, absent express exemption, the Act generally precludes judicial resolution of all abstract tax controversies, even if the complaining parties would have no other forum in which to bring their challenges.

C

The Court drew these same conclusions in *Bob Jones University* v. *Simon*. See 416 U. S., at 736-746. In that case, the Court rejected a private institution's request that an additional exception beyond the one created in *Enochs* v. *Williams Packing & Navigation Co.*, 370 U. S. 1 (1962) (equity court may issue injunction where it is clear that under no circumstances could the Government prevail), be carved out of the Act.[10] The Court responded that *Williams Packing*

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[9] Our cases make clear that the constitutional nature of a challenge to a tax, as distinct from its probability of success, is of no consequence under the Anti-Injunction Act. See *Alexander* v. *"Americans United" Inc.*, 416 U. S., at 759; *Bailey* v. *George*, 259 U. S. 16, 20 (1922); *Dodge* v. *Osborn*, 240 U. S. 118, 121 (1916). Congress can be presumed to have had knowledge of those cases when it amended the Act in 1966 and in later years when it passed related legislation. See *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U. S. 353, 382, and n. 66 (1982); *Lorillard* v. *Pons*, 434 U. S. 575, 580-581 (1978).

> "was meant to be the capstone to judicial construction of the Act. It spells an end to a cyclical pattern of allegiance to the plain meaning of the Act, followed by periods of uncertainty caused by a judicial departure from that meaning, and followed in turn by the Court's rediscovery of the Act's purpose." 416 U. S., at 742.

Bob Jones University then reaffirmed that, except where a litigant can show both that the Government would "under no circumstances . . . prevail" and that equity jurisdiction is otherwise present, the Act would be given its "literal effect." *Id.*, at 737, 742–745.

Because the plaintiffs in *Bob Jones University* were assured ultimately of having access to a judicial forum, the Court did not definitively resolve whether Congress could bar a tax suit in which the complaining party would be denied all access to judicial review. See *id.*, at 746. But the Court's reference to "a case in which an aggrieved party has no access at all to judicial review" came in the context of its discussion of the taxpayer's claim that postponement of its challenge to the revocation of its tax-exempt status would violate due process. *Bob Jones University*'s dictum, therefore, should be interpreted only as reflecting the established rule that Congress cannot, consistently with due process, deny a taxpayer with property rights at stake all opportunity for an ultimate judicial determination of the legality of a tax assessment against him. See *Phillips* v. *Commissioner*, 283 U. S. 589, 596–597 (1931).

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[10] The *Williams Packing* exception is not applicable in this case. Though South Carolina's Tenth Amendment and intergovernmental tax immunity claims are serious ones, we cannot say that there are no circumstances under which the Government could prevail. Thus, even if § 103(j)(1) would cause the State irreparable injury, South Carolina could not rely on the *Williams Packing* exception to invoke a court's authority to review.

On this reading, *Bob Jones University*'s recognition that the complete inaccessability of judicial review might implicate due process concerns provides absolutely no basis for crafting an exception in this case. The State of South Carolina is not a "person" within the meaning of the Due Process Clause. See *South Carolina* v. *Katzenbach*, 383 U. S. 301, 323–324 (1966). Nor does the State assert a right cognizable as a "property" interest protected by that Clause. See generally *Logan* v. *Zimmerman Brush Co.*, 455 U. S. 422, 430–433 (1982) (cataloging cases). Therefore, it has no due process right to review of its claim in a judicial forum.[11]

In holding that the Act does not bar suits by nontaxpayers with no other remedies, the Court today has created a "breach in the general scheme of taxation [that] gives an opening for the disorganization of the whole plan . . . ." *Allen* v. *Regents of University System of Ga.*, 304 U. S. 439, 454 (1938) (Reed, J., concurring in result). Nontaxpaying associations of taxpayers, and most other nontaxpayers, will now be allowed to sidestep Congress' policy against judicial resolution of abstract tax controversies. They can now challenge both Congress' tax statutes and the Internal Revenue Service's regulations, Revenue Rulings, and private letter decisions. In doing so, they can impede the process of collecting federal revenues and require Treasury to focus its energies on questions deemed important not by it or Congress but by a host of private plaintiffs. The Court's holding travels "a long way down the road to the emasculation of the Anti-Injunction Act, and down the companion pathway that leads to the blunting of the strict requirements of *Williams Packing* . . . ." *Commissioner* v. *Shapiro*, 424 U. S. 614, 635 (1976) (BLACKMUN, J., dissenting). I simply cannot join such a fundamental undermining of the congressional purpose.

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[11] Taxing measures inevitably have a pecuniary impact on nontaxpayers who are linked to the persons against whom a tax is imposed. This Court has held that the indirect impacts of a tax, no matter how detrimental, generally do not invade any interest cognizable under the Due Process Clause. See, *e. g.*, *Bob Jones University* v. *Simon* (indirect impact on charitable organization); *United States* v. *American Friends Service Committee*, 419 U. S. 7 (1974) *(per curiam)* (indirect impact on First Amendment interests of employees). There is no occasion here to address when, if ever, such indirect impacts would implicate due process concerns if no judicial review of the complaining party's direct tax liabilities would ultimately be available. Cf. *Bob Jones University* v. *Simon*, 416 U. S., at 747–748 (discussing powerful governmental interests); *Investment Annuity, Inc.* v. *Blumenthal*, 197 U. S. App. D. C., at 242–245, 609 F. 2d, at 7–10 (indirect impact on nontaxpaying business does not implicate Due Process Clause even though no judicial review otherwise available).

II

The Act's language, purpose, and history should leave no doubt that Congress intended to preclude both taxpayer and nontaxpayer suits, regardless of the availability of an alternative forum. The Solicitor General agrees and contends that, since the anti-injunction prohibition extends to "any court," it should be read to bar this Court from acting in its original jurisdiction as well. The Solicitor General's contention raises a grave constitutional question: namely, whether Congress constitutionally can impose remedial limitations so jurisdictional in nature that they effectively withdraw the original jurisdiction of this Court.

A

Under the language used in Art. III of the Constitution, Congress relates to the courts of the United States in three textually different ways.[12] In its broadest textual delegation,

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[12] Article III provides, in pertinent part:

"Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .

"Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls; . . . —to Controversies . . . between a State and Citizens of another State . . . .

[Footnote 12 is continued on p. 396]

that Article authorizes Congress to establish the "inferior Courts" and places no express limits on the congressional power to regulate the courts so created. See U. S. Const., Art. III, § 1, cl. 1. By contrast, that Article itself creates the Supreme Court and textually differentiates between Congress' relationship with the appellate and original jurisdictions of that Court. Article III expressly empowers Congress to make "Exceptions" and "Regulations" to the appellate jurisdiction. U. S. Const., Art. III, § 2, cl. 2; *Ex parte McCardle*, 7 Wall. 506 (1869) (dismissing for want of appellate jurisdiction). But, in what is effectively its narrowest delegation, Art. III is silent regarding Congress' authority to make exceptions to or regulations regarding cases in the original jurisdiction—those that affect "Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party." *Ibid.*

Though the original history of Art. III is sparse,[13] what is available indicates that these textual differences were purposeful on the Framers' part. The Framers obviously thought that the National Government should have a judicial system of its own and that that system should have a Supreme Court. However, because the Framers believed the state courts would be adequate for resolving most disputes, they generally left Congress the power of determining what cases, if any, should be channelled to the federal courts. The one textual exception to that rule concerned the original jurisdiction, where the Framers apparently mandated that Supreme Court review be available. "The evident purpose

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"In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

[13] See Note, The Original Jurisdiction of the United States Supreme Court, 11 Stan. L. Rev. 665, and n. 3 (1959).

was to open and keep open the highest court of the nation for the determination, in the first instance, of suits involving a State or a diplomatic or commercial representative of a foreign government." *Ames* v. *Kansas*, 111 U. S. 449, 464 (1884). The Framers apparently thought that "[s]o much was due . . . the rank and dignity of those for whom the provision was made . . . ." *Ibid.;* see also The Federalist No. 81, pp. 507–509 (H. Lodge ed. 1888) (A. Hamilton). Perhaps more importantly, the Framers also thought that the original jurisdiction was a necessary substitute for the powers of war and diplomacy that these sovereigns previously had relied upon. See *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 450 (1945); *United States* v. *Texas*, 143 U. S. 621, 641 (1892). "The Supreme Court [was] given higher standing than any known tribunal, both by the *nature* of its rights and the *categories* subject to its jurisdiction," A. de Tocqueville, Democracy in America 149 (J. Mayer ed. 1969) (emphasis in original), precisely to keep sovereign nations and States from using force "to rebuff the exaggerated pretensions of the Union . . . ." *Id.*, at 150.

Our cases have long paid tribute to the foreign sovereignty and federalism concerns forming the basis of the original jurisdiction. See *Ames* v. *Kansas*, *supra*, at 464–465; *Maryland* v. *Louisiana*, 451 U. S. 725, 743 (1981). Out of respect for these concerns, the Court has held that Congress is without power to add parties not within the initial grant of original jurisdiction, see *Marbury* v. *Madison*, 1 Cranch 137, 174 (1803), and has indicated, in dicta, that Congress may not withdraw that jurisdiction either. See, *e. g.*, *California* v. *Arizona*, 440 U. S. 59, 65–66 (1979); *California* v. *Southern Pacific Co.*, 157 U. S. 229, 261 (1895); *Wisconsin* v. *Pelican Insurance Co.*, 127 U. S. 265, 300 (1888); *Ames* v. *Kansas*, *supra*, at 464; *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 332 (1816); *Marbury* v. *Madison*, *supra*, at 174. Enlarging the original jurisdiction would require the sovereigns for whom the provision was made to compete with other, less dignified, parties for the Court's limited time and resources; diminishing the original jurisdiction possibly would leave those sovereigns without an acceptable alternative to diplomacy and war for settling disputes.

To be sure, the Tax Anti-Injunction Act does not expressly withdraw the original jurisdiction of this Court. Rather, it merely prohibits "any court" from "maintain[ing]" a suit that has "the purpose of restraining the assessment or collection" of federal taxes. See 26 U. S. C. § 7421(a). The effect of this prohibition, however, is to preclude this Court ever from assuming original jurisdiction to adjudicate a State *qua* State's Tenth and Sixteenth Amendment tax claims, in apparent derogation of the grant's constitutional purpose.[14] While "Congress has broad powers over the jurisdiction of the federal courts and over the sovereign immunity of the United States[,] it is extremely doubtful that they include the power to limit in this manner the original jurisdiction conferred upon this Court by the Constitution." *California* v. *Arizona,* 440 U. S., at 66.

B

Nevertheless, it is this Court's longstanding practice to avoid resolution of constitutional questions except when absolutely necessary. *Ibid.* "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932). Such a construction is possible in this case.

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[14] The Solicitor General contends that the Act only fortuitously prevents the State of South Carolina from invoking its constitutional claims in this Court. See Supplemental Memorandum for Defendant 6–7. I do not think the fortuity of the effect saves the statute from constitutional doubt. As the Solicitor General himself reads the Act, it categorically prevents the State of South Carolina from maintaining a suit in this Court's original jurisdiction, which is precisely what Art. III arguably entitles the State to do. The fact that a bond interest recipient can litigate the constitutionality of § 103(j)(1) in due course, see *id.*, at 7, does not mitigate an otherwise effective denial of the original forum to the State of South Carolina.

The manifest purpose of the Tax Anti-Injunction Act is simply to permit the United States to assess and collect taxes without undue judicial interference and to require that legal challenges be raised in certain designated forums. The language and history of the Act evidence a congressional desire generally to bar both taxpayer and nontaxpayer suits, since both can substantially interrupt "the process of collecting the taxes on which the government depends for its continued existence" if left uncontrolled. *State Railroad Tax Cases*, 92 U. S., at 613. Similarly, the language and history evidence a congressional desire to prohibit courts from restraining any aspect of the tax laws' administration, since the prohibition against injunctions should not depend upon the alleged legality or character of a particular assessment. See *Snyder* v. *Marks*, 109 U. S., at 192–194. Yet the statute was enacted against a settled history in which foreign and state sovereigns had a unique right to seek refuge in the original jurisdiction of this Court. Nothing in the legislative history of the Act of 1867, of the later amendments, or of the related declaratory judgment provisions enacted in 1974, 1976, or 1978, mentions any intent to alter these sovereign parties' unique right occasionally to seek injunctive relief by original action in this Court, even with regard to tax matters.

Admittedly, the Act precludes "any court" from maintaining a suit initiated for the purpose of restraining the assessment or collection of federal taxes. See 26 U. S. C. § 7421(a). That language clearly instructs all courts that Congress constitutionally controls not to prematurely interfere with the assessment and collection of federal taxes. That language does not, however, necessarily encompass this Court, which Congress did not create and which Congress is not expressly empowered to make "Exceptions" or "Regulations" as to its original jurisdiction. Moreover, since only a small number of pre-enforcement suits could conceivably involve a party for whom the original jurisdiction was created, there is no reason to believe that Congress would want to have the constitutionality of its anti-injunction policy placed into question.[15] Given this *de minimis* effect and the absence of express congressional intent to the contrary, I would conclude that the Act's reference to "any court" means to assure that all *state*, as well as federal, courts are subject to the anti-injunction prohibition. Such an interpretation gives meaning to the Act and avoids a grave constitutional question.[16]

III

Interpreting the Tax Anti-Injunction Act to bar both taxpayer and nontaxpayer claims in "any court" but this Court requires a determination whether this case is "appropriate" for the Court's obligatory original jurisdiction. *Illinois* v. *City of Milwaukee*, 406 U. S. 91, 93 (1972). "[A]lthough it may initially have been contemplated that this Court would always exercise its original jurisdiction when properly called upon to do so," *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U. S. 493, 497 (1971), our cases recognize "the need [for] exercise of a sound discretion in order to protect this Court from an abuse of the opportunity to resort to its original jurisdiction . . . ." *Massachusetts* v. *Missouri*, 308 U. S. 1, 19 (1939). An original party establishes that a case is "appropriate" for obligatory jurisdiction by demonstrating, through "clear and convincing evidence," that it has suffered an injury of "serious magnitude," see *New York* v. *New Jersey*, 256 U. S. 296, 309 (1921); see also *Alabama* v. *Arizona*, 291 U. S. 286, 292 (1934), and that it otherwise will be without an alternative forum. *Maryland* v. *Louisiana*, 451 U. S., at 740; *Illinois* v. *City of Milwaukee*, *supra*, at 93. The State of South Carolina's motion for leave to file satisfies, albeit by the barest of margins, both of these tests.[17]

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[15] In this vein, Congress itself has recently questioned its power to withdraw the Court's original jurisdiction. In enacting the Diplomatic Relations Act of 1978, which changed the Court's original jurisdiction of actions involving ambassadors or foreign states from exclusive to concurrent, the Senate Judiciary Committee concluded that "Congress may not deny to the Supreme Court jurisdiction which is expressly granted to it by the Constitution." S. Rep. No. 95-1108, p. 6 (1978).

[16] Since the Federal Declaratory Judgment Act, 28 U. S. C. § 2201 (1982 ed.), which prohibits "any court of the United States" from declaring rights of parties "with respect to Federal taxes," clearly has no jurisdictional effect, I have no occasion to address it at this time.

The State has demonstrated injury of "serious magnitude." It contends, and provides uncontroverted affidavits to support, that application of § 103(j)(1) will "materially interfere with and infringe upon the authority of South Carolina to borrow funds." Complaint 16. The authority the State claims has significant historical basis, see *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429 (1895), and the injury the State alleges could deprive it of a meaningful political choice. See *Colorado* v. *Kansas*, 320 U. S. 383, 393, and n. 8 (1943). Twenty-four States have filed a joint brief *amici curiae* in support of South Carolina's motion, which further attests to the "serious magnitude" of the federalism concerns at issue.

Similarly, the State *qua* State has demonstrated that it has no adequate alternative forum in which to raise its unique Tenth and Sixteenth Amendment claims. See *Maryland* v. *Lousiana*, *supra*, at 743, and n. 19. If the State issues bearer bonds and urges its purchasers to contest the legality of § 103(j)(1), it will suffer irremedial injury. The purchasers will inevitably demand higher interest rates as compensation for bearing the risk of future potential federal taxes. Conversely, if the State forsakes bearer bonds in favor of registered ones, it will bear the increased expense that issuers of registered bonds incur, and it will be unable ever to contest the constitutionality of § 103(j)(1). In short, the State will suffer irremedial injury if the Court does not assume original jurisdiction.

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[17] The Solicitor General concedes that, absent a bar from the Anti-Injunction Act, this case falls within the literal terms of the constitutional and statutory grant of original jurisdiction to this Court. See Supplemental Memorandum for Defendant 1–2.

Therefore, although great deference is due the longstanding congressional policy against premature judicial interference with federal taxes, I believe it is proper to exercise the Court's original jurisdiction under these unique circumstances. I emphasize both the unique circumstances of this case and the congressional policy against premature judicial interference because original litigants should not be misled into believing that this Court will become a haven for suits that cannot be entertained in lower courts with concurrent jurisdiction. The original jurisdiction is not a forum for litigating everyday tax concerns. Rather, it must be "sparingly" invoked. *United States* v. *Nevada*, 412 U. S. 534, 538 (1973). Moreover, the legislative policy against premature judicial interference embodied in the Act must be paid the highest deference by this Court. Thus, where the original party does not present a clear and convincing case that the tax at issue will impair its ability to structure integral operations of its government *and* that irremedial injury is likely to occur absent review in the original jurisdiction, I would defer to the legislative directive against premature judicial interference.[18] But since South Carolina's claims meet these stringent requirements, its motion for leave to file should be granted.

IV

I agree with the Court that the record is not sufficiently developed to permit us to address the merits and that a Special Master should be appointed. But I do not share its view that the Tax Anti-Injunction Act applies only when Congress has provided an alternative avenue for a complaining party—one with original status or not—to litigate claims on its own behalf. That view is not, in my opinion, based on any fair or even tenable canon of statutory construction, and cannot be reconciled with express statements of congressional intent and purpose. Accordingly, I can concur only in the Court's judgment.

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[18] Thus, where Congress expressly leaves open an alternative forum in which an original plaintiff can raise its claims, this Court will ordinarily presume that original jurisdiction is inappropriate. For example, where Congress allows the state, but not the federal, courts to issue injunctive relief, as Congress has done in the Norris-La Guardia Act, 29 U. S. C. § 104, and § 2283 of the Judicial Code, 28 U. S. C. § 2283, an original plaintiff could rarely, if ever, demand access to the obligatory original jurisdiction.

JUSTICE STEVENS, concurring in part and dissenting in part.

While I join Parts I and II of the Court's opinion, I disagree with Part III. The Solicitor General has persuaded me that the Court should exercise its discretion to deny leave to file this complaint. We should do so not only because the proceeding can be conducted more expeditiously in another forum,[1] but also because it is so plain that even if we read the complaint liberally in favor of the State of South Carolina, there is simply no merit to the claim the State has advanced. I do not believe the Court does a sovereign State a favor by giving it an opportunity to expend resources in litigation that has no chance of success. I would therefore deny leave to file.

South Carolina claims that § 103(j)(1) of the Internal Revenue Code of 1954, 26 U. S. C. § 103(j)(1) (1982 ed.), as added by § 310(b)(1) of the Tax Equity and Fiscal Responsibility Act of 1982, 96 Stat. 596, is unconstitutional because it abridges the State's power to borrow money. Under the federal statute, the income that private citizens receive from state bonds is taxed unless the bonds are issued in registered form. As a practical matter, this requirement will force South Carolina to issue its bonds in registered form. Its complaint alleges that registered bonds are more costly to issue than bearer bonds and therefore that its future bond issues will generate smaller net revenues for the State.

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[1] As the Solicitor General points out: "[T]his case is particularly inappropriate for the exercise of this Court's discretionary original jurisdiction. First, given the demands on this Court's original and appellate docket, it seems plain that a district court could hear the case more promptly. This is especially true in light of the fact that to support its claim, South Carolina would undoubtedly seek to introduce evidence of the actual burden imposed upon it by the federal tax statute. Such a proceeding could be more expeditiously conducted at the usual trial court level by a federal district court." Brief in Opposition 12. See *United States* v. *Nevada*, 412 U. S. 534, 538 (1973); *Washington* v. *General Motors Corp.*, 406 U. S. 109 (1972); *Illinois* v. *City of Milwaukee*, 406 U. S. 91 (1972); *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U. S. 493 (1971).

Although the State's constitutional arguments are not stated in precisely this form, in essence it claims that the statute is invalid because it violates: (1) the doctrine of intergovernmental tax immunity; (2) the Tenth Amendment; and (3) the doctrine of *National League of Cities* v. *Usery*, 426 U. S. 833 (1976). A long line of cases plainly forecloses the first claim; the other two are frivolous.

I

The origins of intergovernmental taxation immunity are found in *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819). Of course, *McCulloch* dealt not with the immunity of the States, but rather with that of the United States. The Court held that the State of Maryland could not constitutionally tax the Bank of the United States because the power to tax the bank could be used to destroy it, thereby undermining the constitutionally guaranteed supremacy of the Federal Government. See *id.*, at 425–437. The Court's argument was premised explicitly upon the Supremacy Clause of the Constitution, and thus its holding did not require that any immunity from taxation be accorded the States.[2]

Therefore, the case upon which South Carolina relies is not *McCulloch* but *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429 (1895). There the Court specifically held that a provision of the federal income tax statute taxing income derived from municipal bonds was unconstitutional. It noted that the Court had previously held that the United States lacks the authority to tax the property or revenues of States or municipalities, since their independence from federal control is secured by the Tenth Amendment. Of the cases cited by the Court, most dealt with whether the Federal Government could lay a tax directly upon the property of States or localities, paid by them. In only one, *Collector* v. *Day*, 11 Wall. 113 (1871), did the Court address whether the United States could tax the income of an individual derived from his dealings with a State. There, the Court had held that the United States could not tax the salaries of judicial officers of a State. After reciting this case law, the Court continued:

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[2] Moreover, *McCulloch* dealt with a tax imposed directly upon a governmental body, rather than a tax imposed upon an individual's income derived from his dealings with a governmental body.

> "It is contended that although the property or revenues of the States or their instrumentalities cannot be taxed, nevertheless the income derived from state, county, and municipal securities can be taxed. But we think the same want of power to tax the property or revenues of the States or their instrumentalities exists in relation to a tax on the income from their securities, and for the same reason, and that reason is given by Chief Justice Marshall in *Weston* v. *Charleston*, 2 Pet. 449, 468, where he said: 'The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence, depends on the will of a distinct government. To any extent, however inconsiderable, it is a burthen on the operations of government. It may be carried to an extent which shall arrest them entirely. . . . The tax on government stock is thought by this court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and consequently to be repugnant to the Constitution.' Applying this language to these municipal securities, it is obvious that taxation on the interest therefrom would operate on the power to borrow before

> it is exercised, and would have a sensible influence on the contract, and that the tax in question is a tax on the power of the States and their instrumentalities to borrow money, and consequently repugnant to the Constitution." 157 U. S., at 585–586 (ellipsis in original).

The theory employed in *Pollock* is what I shall refer to as the "intergovernmental burden" theory: even though a tax is not laid directly upon another government, if it has a "sensible influence" on the costs incurred by that government, it must fall. This theory is the only rationale offered by the *Pollock* Court for its decision, and it is on this theory that *Pollock* must stand or fall.

The precedential weight of *Pollock* was doubtful almost from the start. Within a generation *Pollock* was seemingly overruled by constitutional amendment. The Sixteenth Amendment, ratified in 1913, states: "The Congress shall have power to lay and collect taxes on incomes, *from whatever source derived*, without apportionment among the several States, and without regard to any census or enumeration." (Emphasis supplied.) This clear language makes the fact that income is derived from interest on state or local obligations constitutionally irrelevant.

Any doubt about the vitality of *Pollock* is dispelled by our subsequent cases. At every opportunity, this Court has rejected the intergovernmental burden theory.

In *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514 (1926), the Court first rejected the theory. It held that the United States could tax the income derived by an independent contractor from its contracts with a State. The Court recognized that the federal tax increased costs incurred by the State,[3] but nevertheless upheld the tax:

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[3] The Court easily dismissed the conceptual basis for the intergovernmental burden theory, correctly observing that every exercise of taxing power necessarily creates such a burden.

"In a broad sense, the taxing power of either [the state or federal] government, even when exercised in a manner admittedly necessary and

> "[H]ere the tax is imposed on the income of one who is neither an officer nor an employee of government and whose only relation to it is that of contract, under which there is an obligation to furnish service, for practical purposes not unlike a contract to sell and deliver a commodity. The tax is imposed without discrimination upon income whether derived from services rendered to the state or services rendered to private individuals. In such a situation it cannot be said that the tax is imposed upon an agency of government in any technical sense, and the tax cannot be deemed to be an interference with government, or an impairment of the efficiency of its agencies in any substantial way." *Id.*, at 524–525.[4]

Thus, the conceptual basis for *Pollock* had been undermined. A burden on the State imposed by taxing those who contract with it was no longer sufficient to invalidate a tax; the theory that a State's contracts could not be taxed which the Court had relied upon in *Pollock* was no longer good law.[5]

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proper, unavoidably has some effect upon the other. The burden of federal taxation necessarily sets an economic limit to the practical operation of the taxing power of the states, and *vice versa.* Taxation by either the state or the federal government affects in some measure the cost of operation of the other." 269 U. S., at 523.

[4] In *James* v. *Dravo Contracting Co.*, 302 U. S. 134 (1937), the Court followed *Metcalf & Eddy* in holding that a State could tax the income of an independent contractor of the United States. See also *Atkinson* v. *Tax Comm'n*, 303 U. S. 20, 21 (1938) *(per curiam); Silas Mason Co.* v. *Tax Comm'n*, 302 U. S. 186 (1937). Similarly, in *Willcuts* v. *Bunn*, 282 U. S. 216 (1931), the Court held that capital gains derived from sales of municipal bonds could be taxed by the United States, despite the fact that this tax would reduce the value of the bonds. See also *Greiner* v. *Lewellyn*, 258 U. S. 384 (1922) (federal estate tax may be levied upon the value of state bonds transferred upon death).

[5] This was made even clearer in *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376 (1938), where the Court upheld the power of the United States to tax income derived from property leased from a State.

"[I]mmunity from non-discriminatory taxation sought by a private person for his property or gains because he is engaged in operations under a gov-

In *Helvering* v. *Gerhardt*, 304 U. S. 405 (1938), the repudiation of *Pollock* was unmistakable. The Court there held that the United States could tax the salaries of state employees. The Court began its analysis by pointing out that the scope of *McCulloch* was limited to state taxation of federal instrumentalities.[6] The Court read *Weston* v. *Charleston*, 2 Pet. 449 (1829), on which the *Pollock* Court had relied, as also limited in its application to state taxes, involving as it did an attempt whereby through state taxation "an impediment was laid upon the exercise of a power with respect to which the national government was supreme." 304 U. S., at 413, n. 3. It concluded that state immunity against federal taxation must be narrowly construed since "the people of all the states have created the national government and are represented in Congress. Through that representation they exer-

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ernment contract or lease cannot be supported by merely theoretical conceptions of interference with the functions of government. Regard must be had to substance and direct effects. And where it merely appears that one operating under a government contract or lease is subjected to a tax with respect to his profits on the same basis as others who are engaged in similar businesses, there is no sufficient ground for holding that the effect upon the Government is other than indirect and remote." *Id.*, at 386–387. See also *Helvering* v. *Bankline Oil Co.*, 303 U. S. 362, 369–370 (1938).

[6] "In sustaining the immunity from state taxation, the opinion of the Court, by Chief Justice Marshall, recognized a clear distinction between the extent of the power of a state to tax national banks and that of the national government to tax state instrumentalities. He was careful to point out not only that the taxing power of the national government is supreme, by reason of the constitutional grant, but that in laying a federal tax on state instrumentalities the people of the states, acting through their representatives, are laying a tax on their own institutions and consequently are subject to political restraints which can be counted on to prevent abuse. State taxation of national instrumentalities is subject to no such restraint, for the people outside the state have no representatives who participate in the legislation; and in a real sense, as to them, the taxation is without representation. The exercise of the national taxing power is thus subject to a safeguard which does not operate when a state undertakes to tax a national instrumentality." 304 U. S., at 412 (footnote omitted).

cise the national taxing power. The very fact that when they are exercising it they are taxing themselves, serves to guard against its abuse . . . ." *Id.*, at 416. Moreover,

> "any allowance of a tax immunity for the protection of state sovereignty is at the expense of the sovereign power of the nation to tax. Enlargement of the one involves diminution of the other. When enlargement proceeds beyond the necessity of protecting the state, the burden of the immunity is thrown upon the national government with benefit only to a privileged class of taxpayers. . . . [I]f every federal tax which is laid on some new form of state activity, or whose economic burden reaches in some measure the state or those who serve it, were to be set aside as an infringement of state sovereignty, it is evident that a restriction on the national power, devised only as a shield to protect the states from curtailment of the essential operations of government which they have exercised from the beginning, would become a ready means for striking down the taxing power of the nation." *Id.*, at 416–417.

The Court concluded by explicitly rejecting the intergovernmental burden theory:

> "The state and national governments must co-exist. Each must be supported by taxation of those who are citizens of both. The mere fact that the economic burden of such taxes may be passed on to a state government and thus increase to some extent, here wholly conjectural, the expense of its operation, infringes no constitutional immunity. Such burdens are but normal incidents of the organization within the same territory of two governments, each possessed of the taxing power." *Id.*, at 422.

In *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466 (1939), the Court held that a State could tax the salary of a federal employee.[7] After again observing that state taxation immunity is narrower than that of the United States, see *id.*, at 477–478, and should be narrowly construed, see *id.*, at 483–484, the Court followed *Gerhardt* in upholding the state tax, overruled *Collector* v. *Day*, which had been relied upon in *Pollock*, and noted, in a passage pertinent to the claim made here by South Carolina, that "we perceive no basis for a difference in result whether the taxed income be salary or some other form of compensation . . . ." 306 U. S., at 486. The Court concluded by again repudiating the intergovernmental burden theory.

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[7] Justice Frankfurter, in his separate opinion, explained how state immunity from taxation had been derived incorrectly from dicta in *McCulloch*. "Partly as a flourish of rhetoric and partly because the intellectual fashion of the times indulged a free use of absolutes, Chief Justice Marshall gave currency to the phrase that 'the power to tax involves the power to destroy.' This dictum was treated as though it were a constitutional mandate. . . . The seductive *cliché* that the power to tax involves the power to destroy was fused with another assumption, likewise not to be found in the Constitution itself, namely the doctrine that the immunities are correlative—because the existence of the national government implies immunities from state taxation, the existence of state governments implies equivalent immunities from federal taxation. . . .

"All these doctrines of intergovernmental immunity have until recently been moving in the realm of what Lincoln called 'pernicious abstractions.' The web of unreality spun from Marshall's famous dictum was brushed away by one stroke of Mr. Justice Holmes's pen: 'The power to tax is not the power to destroy while this Court sits.' *Panhandle Oil Co.* v. *Mississippi*, 277 U. S. 218, 223 (dissent). Failure to exempt public functionaries from the universal duties of citizenship to pay for the costs of government was hypothetically transmuted into hostile action of one government against the other. A succession of decisions thereby withdrew from the taxing power of the States and Nation a very considerable range of wealth without regard to the actual workings of our federalism, and this, too, when the financial needs of all governments began steadily to mount." 306 U. S., at 489–490 (concurring opinion) (citation and footnote omitted).

Justice Frankfurter later added: "Chief Justice Marshall spoke at a time when social complexities did not so clearly reveal as now the practical limitations of a rhetorical absolute. . . . To press a juristic principle designed for the practical affairs of government to abstract extremes is neither sound logic nor good sense. And this Court is under no duty to make law less than sound logic and good sense." *New York* v. *United States*, 326 U. S. 572, 576–577 (1946) (opinion of Frankfurter, J.).

> "So much of the burden of a non-discriminatory general tax upon the incomes of employees of a government, state or national, as may be passed on economically to that government, through the effect of the tax on the price level of labor or materials, is but the normal incident of the organization within the same territory of two governments, each possessing the taxing power. The burden, so far as it can be said to exist or to affect the government in any indirect or incidental way, is one which the Constitution presupposes, and hence it cannot rightly be deemed to be within an implied restriction upon the taxing power of the national and state governments which the Constitution has expressly granted to one and has confirmed to the other." *Id.*, at 487.[8]

The intergovernmental burden theory was rejected about as clearly as possible in *Alabama* v. *King & Boozer*, 314 U. S. 1 (1941), in which the Court upheld a state sales tax levied on the cost of material used by a federal contractor in performing a cost-plus contract, despite the fact that under the contract the economic burden of the tax fell exclusively on the United States.[9] Subsequently, the Court has consistently adhered to its repudiation of the intergovernmental burden theory. See *Washington* v. *United States*, 460 U. S. 536, 540 (1983); *Memphis Bank & Trust Co.* v. *Garner*, 459 U. S. 392, 397 (1983); *United States* v. *New Mexico*, 455 U. S. 720, 734 (1982); *United States* v. *County of Fresno*, 429 U. S. 452, 460–462 (1977); *Gurley* v. *Rhoden*, 421 U. S. 200, 205 (1975). As the Court recently wrote, "an economic burden on traditional state functions without more is not a sufficient basis for sustaining a claim of immunity." *Massachusetts* v. *United States*, 435 U. S. 444, 461 (1978).[10]

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[8] See also *Sims* v. *United States*, 359 U. S. 108, 110–111 (1959); *State Tax Comm'n* v. *Van Cott*, 306 U. S. 511 (1939).

[9] "So far as such a non-discriminatory state tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity." 314 U. S., at 8–9.

Perhaps the plainest explication of this Court's position on state tax immunity is found in *New York* v. *United States*, 326 U. S. 572 (1946), a case holding that the United States could tax New York's income from its sale of state-owned mineral waters. Justice Frankfurter, joined by Justice Rutledge, wrote that in his view any nondiscriminatory tax on state activities was constitutional. See *id.*, at 581–584 (opinion of Frankfurter, J.); see also *id.*, at 584–585 (Rutledge, J., concurring). Four additional Justices agreed that the tax was valid, stating: "Only when and because the subject of taxation is State property or a State activity must we consider whether such a non-discriminatory tax unduly interferes with the performance of the State's functions of government." *Id.*, at 588 (Stone, C. J., joined by Reed, Murphy, and Burton, JJ., concurring in result).[11]

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[10] While the Court, for a time, did continue to cite *Pollock* either in dicta, see *Indian Motorcycle Co.* v. *United States*, 283 U. S. 570, 577 (1931); *Gillespie* v. *Oklahoma*, 257 U. S. 501, 505 (1922); *Farmers & Mechanics Savings Bank of Minneapolis* v. *Minnesota*, 232 U. S. 516, 526–527 (1914); or only to distinguish it in the course of upholding federal taxes on state instrumentalities, see *Helvering* v. *Gerhardt*, 304 U. S. 405, 417 (1938); *Helvering* v. *Mountain Producers Corp.*, 303 U. S., at 386; *Choteau* v. *Burnet*, 283 U. S. 691, 696 (1931); *Willcuts* v. *Bunn*, 282 U. S., at 225; *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 521 (1926); *Greiner* v. *Lewellyn*, 258 U. S., at 386; *South Carolina* v. *United States*, 199 U. S. 437, 453 (1905); see also *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308, 315–316 (1937); it has long since stopped treating *Pollock* with even that much respect; the Court has not cited the holding of *Pollock* since *Gerhardt*, almost half a century ago. As I have suggested above, however, the rationale of *Pollock* had been repudiated at least as early as *Metcalf & Eddy*. Moreover, it appears that the Court has *never* relied on *Pollock* for a holding since the passage of the Sixteenth Amendment. Chief Justice Hughes once referred to *Pollock*, along with *Scott* v. *Sandford*, 19 How. 393 (1857), overruled by U. S. Const., Amdt. 14, and *Hepburn* v. *Griswold*, 8 Wall. 603 (1870), overruled by *Legal Tender Cases*, 12 Wall. 457 (1872), as one of the "three notable instances [in which] the Court has suffered severely from self-inflicted wounds." C. Hughes, The Supreme Court of the United States 50 (1928).

S. R. A., Inc. v. *Minnesota*, 327 U. S. 558 (1946), was decided during the same Term. There, land owned by the United States was occupied by S. R. A., which had bought the land under a conditional sales contract that left title in the United States pending full payment of the purchase price. Nevertheless, the Court held that state property taxes could be assessed against the land, since in reality the private party and not the United States was being taxed.[12] Thus the Court recognized that where the property inures to the benefit of a private party, it has no immunity from taxation despite the fact that the taxation may increase the costs imposed on the governmental entity.[13] The same approach was taken in *United States* v. *City of Detroit*, 355 U. S. 466 (1958), when the Court upheld a municipal tax on property owned by the United States but leased to a private party, observing that "it is well settled that the Government's constitutional immunity does not shield private parties with whom it does business from state taxes imposed on them merely because part or all of the financial burden of the tax eventually falls on the Government." *Id.*, at 469.[14] See also *United States* v. *Township of Muskegon*, 355 U. S. 484 (1958); *City of Detroit* v. *Murray Corp.*, 355 U. S. 489 (1958); *Wilmette Park Dist.* v. *Campbell*, 338 U. S. 411, 419–420 (1949).

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[11] These Justices made it clear that the immunity doctrine applies only when the State itself is the taxpayer.

"If the phrase 'non-discriminatory tax' is to be taken in its long accepted meaning as referring to a tax laid on a like subject matter, without regard to the personality of the taxpayer, whether a State, a corporation or a private individual, it is plain that there may be non-discriminatory taxes which, when laid on a State, would nevertheless impair the sovereign status of the State quite as much as a like tax imposed by a State on property or activities of the national government. This is not because the tax can be regarded as discriminatory *but because a sovereign government is the taxpayer*, and the tax, even though non-discriminatory, may be regarded as infringing its sovereignty." 326 U. S., at 587 (emphasis supplied) (citation omitted).

In more recent cases we have found immunity only where the governmental entity itself is legally obligated to bear the costs of the tax. See *United States* v. *New Mexico*, 455 U. S. 720 (1982); *United States* v. *County of Fresno*, 429 U. S. 452 (1977); *United States* v. *Mississippi Tax Comm'n*, 421 U. S. 599 (1975); *Gurley* v. *Rhoden*, 421 U. S. 200 (1975); *First Agricultural National Bank of Berkshire County* v. *Tax Comm'n*, 392 U. S. 339, 346–348 (1968); *Rohr Aircraft Corp.* v. *County of San Diego*, 362 U. S. 628 (1960); *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110 (1954).

Our cases thus demonstrate the insubstantiality of South Carolina's claim. Under § 103(j)(1), South Carolina is not required to pay *any* federal tax at all. The tax is imposed not upon state property or revenues, but only upon persons with whom it contracts. Under the test adopted by a majority of the Court in *New York* v. *United States*, and followed since, this alone defeats its claim. South Carolina is trying to shield private parties with whom it does business from taxation because part of the financial burden of the tax falls upon it. This Court has repeatedly rejected exactly that sort of claim.[15] Moreover, the rationale on which *Pollock* is based—the intergovernmental burden theory—has been repudiated over and over again by this Court. There is simply nothing left of *Pollock* on which South Carolina can base a claim.

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[12] "To say that the payment of the purchase price is a necessary condition precedent to the loss of federal immunity is to make the rule too mechanical. It should be sufficiently flexible to subject real private rights, disentangled from federal policies, to state taxation." 327 U. S., at 569.

[13] The Court briefly disposed of the intergovernmental burden theory: "There is a suggestion that to hold United States property subject to state taxation pending the completion of payment will injuriously affect its salability and therefore interfere with the Government's handling of its affairs. Our recent cases have disposed of this economic argument in a way which is contrary to petitioner's contention." *Id.*, at 570.

[14] "It is undoubtedly true, as the Government points out, that it will not be able to secure as high rentals if lessees are taxed for using its property. But . . . the imposition of an increased financial burden on the Government does not, by itself, vitiate a state tax." 355 U. S., at 472.

Even if there were enough left of *Pollock* to invalidate a federal tax that might cripple traditional state functions, the burden imposed on the State here is far from crushing. South Carolina estimates that if it must issue its bonds in registered form it will have to pay an additional one quarter of one percent interest on its bonds.[16] It identifies in its offer of proof no disruption in its operation except for this slight increase in interest costs.[17] Surely this cost is infinitesimal compared to the costs imposed on States and localities because their employees' salaries are federally taxed—a burden that the Federal Government unquestionably has the constitutional power to impose. Moreover, the challenged statute still provides States and localities with the ability to offer debt instruments at substantially less than the market rates which must be paid by private enterprise—three to five points lower according to South Carolina's estimate. It is hard to see how marginal increases in the interest they must pay can destroy the integrity of governmental entities when private entities are able not only to survive but generally to make a profit while obtaining financing at significantly higher rates of interest. As Professor Thomas Reed Powell observed:

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[15] A host of commentators agree. See, *e. g.*, Kirby, State and Local Bond Interest, in 1 House Committee on Ways and Means, Tax Revision Compendium 679 (Comm. Print 1959); Senate Special Committee on Taxation of Governmental Securities and Salaries, Taxation of Governmental Securities and Salaries, S. Rep. No. 2140, 76th Cong., 3d Sess., pt. 1, pp. 8–16, 25–28 (1940); U. S. Dept. of Justice, Taxation of Government Bondholders and Employees: The Immunity Rule and the Sixteenth Amendment (1938); Boudin, The Taxation of Governmental Instrumentalities, Part Two, 22 Geo. L. J. 254 (1934); Brown, Intergovernmental Tax Immunity: Do We Need a Constitutional Amendment?, 25 Wash. U. L. Q. 153 (1940); Gardner, Tax Immune Bonds, 8 Geo. Wash. L. Rev. 1200 (1940); Philipsborn & Cantrill, Immunity from Taxation of Governmental Instrumentalities, 26 Geo. L. J. 543 (1938); Rakestraw, The Reciprocal Rule of Governmental Tax Immunity—A Legal Myth, 11 Federal B. J. 3 (1950); Ratchford, Intergovernmental Tax Immunities in the United States, 6 National Tax J. 305 (1953); Watkins, The Power of the State and Federal Governments to Tax One Another, 24 Va. L. Rev. 475 (1938); Federal Legislation, Taxability of Government-Bond Interest, 27 Geo. L. J. 768 (1939); Note, The Passing of Intergovernmental Tax Immunity, 33 Ill. L. Rev. 962 (1939); Note, Constitutional and Legislative Bases of Intergovernmental Tax Immunities, 51 Yale L. J. 482 (1942).

[16] As an example, South Carolina states that on November 9, 1982, it sold $115 million in general obligation bonds. Over the life of these bonds South Carolina will pay $97,247,668 in interest. If the bonds were issued

> "Public bonds will not be put in an unfavorable position relatively by being subjected to taxes on the income. They will merely be deprived of an artificial advantage heretofore enjoyed, which however is not strictly necessary in all probability in order to give them a practical success on the financial markets of the country when offered at the same rates of interest that have usually been offered in the past." Powell, Intergovernmental Tax Immunities, 8 Geo. Wash. L. Rev. 1213, 1214–1215 (1940).

In contrast to the slight burden alleged by South Carolina, the Federal Government's interest in encouraging bearer bonds to be issued in registered form is substantial, as the Senate Report on this provision makes clear.

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in registered form, its interest costs would be increased only about $2,800,000—approximately three percent.

[17] *Amici* Texas et al. have submitted affidavits which also indicate only that they will pay slightly higher interest charges if they must issue bonds in registered form. No allegations are made that serious disruptions in the ability of States and localities to provide essential services will result.

> "The Committee believes that a fair and efficient system of information reporting and withholding cannot be achieved with respect to interest-bearing obligations as long as a significant volume of long-term bearer instruments is issued. A system of book-entry registration will preserve the liquidity of obligations while requiring the creation of ownership records that can produce useful information reports with respect to both the payment of interest and the sale of obligations prior to maturity through brokers. Furthermore, registration will reduce the ability of noncompliant taxpayers to conceal income and property from the reach of the income, estate, and gift taxes. Finally, the registration requirement may reduce the volume of readily negotiable substitutes for cash available to persons engaged in illegal activities." S. Rep. No. 97–494, pt. 1, p. 242 (1982).

As this Court has previously held, the Constitution does not invalidate every burden on a State or locality created by federal taxation because such burdens are the "normal incident" of a system of dual sovereigns with dual taxing powers, which the Constitution envisions will coexist. Surely it follows that the Constitution intended that the taxing power it gave the Federal Government not be undermined through the abuse engendered by bearer instruments. The burden imposed upon States and localities by efforts to eliminate such abuse is one necessary in a system committed to the efficacy of dual taxing authorities.

The fairness of this requirement is highlighted by the fact that § 103(j)(1) requires that federally issued bonds also be in registered form to be tax exempt. Even in the heyday of *Pollock*, the Court never held that the Federal Government impermissibly infringed state sovereignty by imposing a burden on the States that it also imposed on itself. If Congress has destroyed some protected concept of state sovereignty through § 103(j)(1), then it has destroyed the sovereignty of the United States as well.

II

South Carolina's complaint alleges that § 103(j)(1) violates the Tenth Amendment. That Amendment provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

In order to bring its challenge within the terms of that Amendment, South Carolina alleges:

> "The Congress of the United States has no power whatsoever to impose an income tax upon the interest paid by South Carolina to its lenders." Complaint ¶ 9.

This allegation is inconsistent with the plain language of the Constitution itself. Article I, § 8, specifically delegates to Congress the "Power To lay and collect Taxes," and the Sixteenth Amendment removes any possible ambiguity concerning the scope of the power exercised by Congress in this case. The cases I have discussed above confirm this point.

Because the power to tax private income has been expressly delegated to Congress, the Tenth Amendment has no application to this case.

III

Finally, South Carolina relies on *National League of Cities* v. *Usery*, 426 U. S. 833 (1976). In that case the Court held that a federal statute extending the provisions of the Fair Labor Standards Act to certain public employees was "not within the authority granted Congress by Art. I, § 8, cl. 3." *Id.*, at 852 (footnote omitted). The conclusion that the case merely involved an interpretation of the outer limits of the congressional power to regulate interstate commerce was then confirmed by the following footnote:

> "We express no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such

> as the spending power, Art. I, § 8, cl. 1, or § 5 of the Fourteenth Amendment." *Id.*, at 852, n. 17.

By its express terms, therefore, the *National League of Cities* case has no application to South Carolina's challenge to an exercise of the federal taxing power.[18]

In sum, I can see no basis on which South Carolina could prevail in this case, even accepting its allegations and offers of proof for all they are worth. We do South Carolina no favor by permitting it to file and litigate a claim on which it has no chance of prevailing. At the same time, the Court's decision to permit South Carolina to file this claim is an unwise use of its scarce resources. Accordingly, I respectfully dissent from the Court's decision to grant South Carolina's motion for leave to file its complaint.

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[18] To come within that case, an exercise of Commerce Clause power must (1) regulate the States as States, (2) address indisputable attributes of state sovereignty, and (3) directly impair the traditional functions of the States. *EEOC* v. *Wyoming*, 460 U. S. 226, 236–237 (1983); *FERC* v. *Mississippi*, 456 U. S. 742, 764, n. 28 (1982); *Hodel* v. *Virginia Surface Mining & Recl. Assn.*, 452 U. S. 264, 287–288 (1981). Even then, the claim fails if the federal interest outweighs those of the States. See *EEOC* v. *Wyoming*, *supra*, at 237; *Hodel*, *supra*, at 288, n. 29. Assuming *National League of Cities* were applicable here, South Carolina's claim would fail on all counts. First, § 103(j)(1) does not regulate the States at all; they are free to issue any type of bonds they like, only the tax consequences for purchasers are affected. Second, the right to issue unregistered bearer bonds has never been considered an indisputable aspect of sovereignty. Third, the offers of proof detail no impairment of its ability to function; only marginal increases in interest costs are demonstrated. The kind of impact on state and local budgets detailed in *National League of Cities*, 426 U. S., at 846–847, 849–851, is not present here. Finally, the federal interest in eliminating a practice which undermines the enforceability of the federal tax system and laws surely is sufficient to outweigh the modest fiscal burdens imposed upon the States by this measure.

MINNESOTA *v.* MURPHY

CERTIORARI TO THE MINNESOTA SUPREME COURT

No. 82-827. Argued October 12, 1983—Decided February 22, 1984

In 1980, respondent pleaded guilty to a sex-related charge in a Minnesota court, and was given a suspended prison sentence and placed on probation. The terms of his probation required him to participate in a treatment program for sexual offenders, to report to his probation officer periodically, and to be truthful with the officer "in all matters." During the course of a meeting with his probation officer, who had previously received information from a treatment counselor that respondent had admitted to a 1974 rape and murder, respondent, upon questioning, admitted that he had committed the rape and murder. After being indicted for first-degree murder, respondent sought to suppress the confession made to the probation officer on the ground that it was obtained in violation of the Fifth and Fourteenth Amendments. The Minnesota trial court found that respondent was not "in custody" at the time of the confession and that the confession was neither compelled nor involuntary despite the absence of *Miranda* warnings. The Minnesota Supreme Court reversed, holding that, notwithstanding the lack of custody in the usual sense, respondent's failure to claim the Fifth Amendment privilege against self-incrimination when he was questioned was not fatal to his claim, because of the nature of his meeting with the probation officer, because he was under court order to respond truthfully, and because the probation officer had substantial reason to believe that respondent's answers were likely to be incriminating.

Held: The Fifth and Fourteenth Amendments did not prohibit the introduction into evidence of respondent's admissions to the probation officer in respondent's subsequent murder prosecution. Pp. 426-440.

(a) The general obligation to appear before his probation officer and answer questions truthfully did not in itself convert respondent's otherwise voluntary statements into compelled ones. Pp. 427-429.

(b) A witness confronted with questions that the government should reasonably expect to elicit incriminating evidence ordinarily must assert the Fifth Amendment privilege rather than answer if he desires not to incriminate himself. If he chooses to answer rather than to assert the privilege, his choice is considered to be voluntary since he was free to claim the privilege and would suffer no penalty as a result of his decision to do so. P. 429.

(c) Respondent cannot claim the benefit of the "in custody" exception to the general rule that the Fifth Amendment privilege is not self-executing. It is clear that respondent was not "in custody" for purposes of receiving *Miranda* protection since there was no formal arrest or restraint on freedom of movement of the degree associated with formal arrest. The factors that the probation officer could compel respondent's attendance and truthful answers and consciously sought incriminating evidence, that respondent did not expect questions about prior criminal conduct and could not seek counsel before attending the meeting, and that there were no observers to guard against abuse or trickery, neither alone nor in combination, are sufficient to excuse respondent's failure to claim the privilege in a timely manner. Pp. 429–434.

(d) Nor was respondent deterred from claiming the privilege against self-incrimination by a reasonably perceived threat of revocation of his probation so as to render the privilege self-executing. The legal compulsion to attend the meeting with the probation officer and to answer truthfully the questions of the officer who anticipated incriminating answers is indistinguishable from that felt by any witness who is required to appear and give testimony, and is insufficient to excuse respondent's failure to exercise the privilege in a timely manner. Whether a subjective or objective test is applied, there is no reasonable basis for concluding that Minnesota attempted to attach an impermissible penalty to the exercise of the privilege. Pp. 434–439.

(e) As opposed to the cases involving federal taxes on gamblers where the Fifth Amendment privilege may be exercised by failing to file a tax return, since if the taxpayer claimed the privilege instead of filing a return he necessarily identifies himself as a gambler, a probationer confronted with incriminating questions ordinarily would have no problem effectively claiming the privilege at the time the disclosures are requested. There is therefore no reason to forgive the requirement that the privilege claim be presented for evaluation in a timely manner. Pp. 439–440.

324 N. W. 2d 340, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which STEVENS, J., joined and in all but Part II–A of which BRENNAN, J., joined, *post*, p. 441.

Robert H. Lynn argued the cause for petitioner. With him on the brief was *Vernon E. Bergstrom.*

David A. Strauss argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Lee, Assistant Attorney General Jensen,* and *Deputy Solicitor General Frey.*

Mark S. Wernick argued the cause and filed a brief for respondent.*

JUSTICE WHITE delivered the opinion of the Court.

In this case, respondent Murphy, who was on probation, made incriminating admissions during a meeting with his probation officer. The issue before us is whether the Fifth and Fourteenth Amendments prohibit the introduction into evidence of the admissions in Murphy's subsequent criminal prosecution.

I

In 1974, Marshall Murphy was twice questioned by Minneapolis police concerning the rape and murder of a teenage girl. No charges were then brought. In 1980, in connection with a prosecution for criminal sexual conduct arising out of an unrelated incident, Murphy pleaded guilty to a reduced charge of false imprisonment. He was sentenced to a prison term of 16 months, which was suspended, and three years' probation. The terms of Murphy's probation required, among other things, that he participate in a treatment program for sexual offenders at Alpha House, report to his probation officer as directed, and be truthful with the probation officer "in all matters." Failure to comply with these conditions, Murphy was informed, could result in his return to the sentencing court for a probation revocation hearing. App. to Pet. for Cert. C-33—C-35.

Murphy met with his probation officer at her office approximately once a month, and his probation continued without incident until July 1981, when the officer learned that he had abandoned the treatment program. The probation offi-

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*A brief of *amicus curiae* urging affirmance was filed by *Sheryl Joyce Lowenthal* for the National Association of Criminal Defense Lawyers.

A brief of *amici curiae* was filed by *Fred E. Inbau*, *Wayne W. Schmidt*, and *James P. Manak* for the International Association of Chiefs of Police, Inc., et al.

cer then wrote to Murphy and informed him that failure to set up a meeting would "result in an immediate request for a warrant." *Id.*, at C–35. At a meeting in late July, the officer agreed not to seek revocation of probation for nonparticipation in the treatment program since Murphy was employed and doing well in other areas.

In September 1981, an Alpha House counselor informed the probation officer that, during the course of treatment, Murphy had admitted to a rape and murder in 1974. After discussions with her superior, the officer determined that the police should have this information.[1] She then wrote to Murphy and asked him to contact her to discuss a treatment plan for the remainder of his probationary period.[2] Although she did not contact the police before the meeting, the probation officer knew in advance that she would report any incriminating statements.

Upon receipt of the letter, Murphy arranged to meet with his probation officer in her office on September 28, 1981. The officer opened the meeting by telling Murphy about the information she had received from the Alpha House counselor and expressing her belief that this information evinced his continued need for treatment. Murphy became angry about what he considered to be a breach of his confidences and stated that he "felt like calling a lawyer."[3] The probation officer replied that Murphy would have to deal with that problem outside the office; for the moment, their primary concern was the relationship between the crimes that Murphy had admitted to the Alpha House counselor and the incident that led to his conviction for false imprisonment.

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[1] The parties stipulated in the trial court that Alpha House was covered by federal statutes providing for the confidentiality of patient records in federally assisted drug and alcohol rehabilitation programs, 21 U. S. C. § 1175 and 42 U. S. C. § 4582, and the regulations adopted pursuant thereto, 42 CFR pt. 2 (1982). Although the Alpha House counselor legitimately informed Murphy's probation officer of his incriminating admissions, we assume, without deciding, that the counselor could not have provided the information to the police. See *id.*, §§ 2.39(a), 2.63; Tr. of Oral Arg. 6. We assume, as well, that the probation officer could not have made the counselor's information available for use in a criminal prosecution. See 42 CFR § 2.39(d) (1982); Tr. of Oral Arg. 6–7.

[2] It is unclear whether the probation officer could have ordered Murphy to pursue additional treatment as a condition of probation. App. to Pet. for Cert. C–14 (testimony of Mara Widseth). But there is no evidence that she used treatment as a subterfuge or that her sole purpose was to obtain incriminating statements for the police. Under our view of the case, such a purpose would not change the result. *Infra*, at 428, 431.

During the course of the meeting, Murphy denied the false imprisonment charge, admitted that he had committed the rape and murder, and attempted to persuade the probation officer that further treatment was unnecessary because several extenuating circumstances explained the prior crimes. At the conclusion of the meeting, the officer told Murphy that she had a duty to relay the information to the authorities and encouraged him to turn himself in. Murphy then left the office. Two days later, Murphy called his probation officer and told her that he had been advised by counsel not to surrender himself to the police. The officer then procured the issuance of an arrest and detention order from the judge who had sentenced Murphy on the false imprisonment charge.

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[3] The trial court concluded that Murphy's statement did not constitute an invocation of the privilege against self-incrimination: "[W]hatever his real intent may have been, we are persuaded by the probation officer's testimony that he did not express [the] desire [to talk to an attorney] in any context other than a civil suit for the breach of confidentiality." App. to Pet. for Cert. B–13—B–14. The Minnesota Supreme Court did not reach this question, and, although we see no reason to question the trial court's factual finding, our analysis of the case makes further consideration unnecessary. Although a request for a lawyer during custodial interrogation is sufficient to invoke the privilege against self-incrimination, *Fare* v. *Michael C.*, 442 U. S. 707, 709 (1979), Murphy was not in custody, *infra*, at 433, and he had no federal right to have an attorney present at the meeting. See *United States* v. *Rea*, 678 F. 2d 382, 390 (CA2 1982); *People* v. *Ronald W.*, 31 App. Div. 2d 163, 165, 295 N. Y. S. 2d 767, 769 (1968), aff'd, 24 N. Y. 2d 732, 249 N. E. 2d 882 (1969); *Hughes* v. *Gwinn*, —— W. Va. ——, ——, 290 S. E. 2d 5, 7 (1981).

On October 29, 1981, a state grand jury returned an indictment charging Murphy with first-degree murder.

Murphy sought to suppress testimony concerning his confession on the ground that it was obtained in violation of the Fifth and Fourteenth Amendments. The trial court found that he was not "in custody" at the time of the statement and that the confession was neither compelled nor involuntary despite the absence of warnings similar to those required by *Miranda* v. *Arizona*, 384 U. S. 436 (1966). The Minnesota Supreme Court reversed on federal constitutional grounds. 324 N. W. 2d 340 (1982). Although recognizing that the Fifth Amendment privilege generally is not self-executing, it concluded that, notwithstanding the lack of custody in the usual sense, Murphy's failure to claim the privilege when he was questioned was not fatal to his claim "[b]ecause of the compulsory nature of the meeting, because [Murphy] was under court order to respond truthfully to his agent's questions, and because the agent had substantial reason to believe that [Murphy's] answers were likely to be incriminating." *Id.*, at 344. In the court's view, "the agent should have warned [Murphy] of his privilege against compelled self-incrimination before she questioned him and . . . her failure to do so, when she had already decided to report his answers to the police, bars use of [Murphy's] confession at this trial." *Ibid.*

We granted certiorari to resolve a conflict among state and federal courts concerning whether a statement made by a probationer to his probation officer without prior warnings is admissible in a subsequent criminal proceeding. 459 U. S. 1145 (1983).[4] We now reverse.

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[4] Compare, *e. g.*, *United States* v. *Steele*, 419 F. Supp. 1385, 1386–1387 (WD Pa. 1976); *People* v. *Garcia*, 240 Cal. App. 2d 9, 12–13, 49 Cal. Rptr. 146, 148 (1966); and *State* v. *Lekas*, 201 Kan. 579, 582–584, 442 P. 2d 11, 15–16 (1968), with, *e. g.*, *United States* v. *Miller*, 643 F. 2d 713, 715 (CA10 1981); *United States* v. *Holmes*, 594 F. 2d 1167 (CA8), cert. denied, 444 U. S. 873 (1979); *Nettles* v. *State*, 248 So. 2d 259, 260 (Fla. App. 1971);

II

The Fifth Amendment, in relevant part, provides that no person "shall be compelled in any criminal case to be a witness against himself." It has long been held that this prohibition not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also "privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Lefkowitz* v. *Turley*, 414 U. S. 70, 77 (1973). In all such proceedings,

> "a witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant. . . . Absent such protection, if he is nevertheless compelled to answer, his answers are inadmissible against him in a later criminal prosecution." *Id.*, at 78 (citations omitted).

A defendant does not lose this protection by reason of his conviction of a crime; notwithstanding that a defendant is imprisoned or on probation at the time he makes incriminating statements, if those statements are compelled they are inadmissible in a subsequent trial for a crime other than that for which he has been convicted. See *Baxter* v. *Palmigiano*, 425 U. S. 308, 316 (1976). The issue in this case is whether the Fifth Amendment right that Murphy enjoyed would be violated by the admission into evidence at his trial for another crime of the prior statements made by him to his probation officer.

Connell v. *State*, 131 Ga. App. 213, 205 S. E. 2d 513, 514 (1974); *State* v. *Hartman*, 281 N. W. 2d 639, 643–644 (Iowa App. 1979); and *People* v. *Parker*, 101 Misc. 2d 800, 802–804, 421 N. Y. S. 2d 561, 562–563 (1979).

A

We note first that the general obligation to appear and answer questions truthfully did not in itself convert Murphy's otherwise voluntary statements into compelled ones. In that respect, Murphy was in no better position than the ordinary witness at a trial or before a grand jury who is subpoenaed, sworn to tell the truth, and obligated to answer on the pain of contempt, unless he invokes the privilege and shows that he faces a realistic threat of self-incrimination. The answers of such a witness to questions put to him are not compelled within the meaning of the Fifth Amendment unless the witness is required to answer over his valid claim of the privilege. This much is reasonably clear from our cases. As this Court has long acknowledged:

> "The [Fifth] Amendment speaks of compulsion. It does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of the privilege, he must claim it or he will not be considered to have been 'compelled' within the meaning of the Amendment." *United States* v. *Monia*, 317 U. S. 424, 427 (1943) (footnote omitted).

This principle has been applied in cases involving a variety of criminal and noncriminal investigations. See, *e. g.*, *United States* v. *Kordel*, 397 U. S. 1, 7–10 (1970); *Rogers* v. *United States*, 340 U. S. 367, 370–371 (1951); *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103, 112–113 (1927). These cases, taken together, "stand for the proposition that, in the ordinary case, if a witness under compulsion to testify makes disclosures instead of claiming the privilege, the government has not 'compelled' him to incriminate himself." *Garner* v. *United States*, 424 U. S. 648, 654 (1976) (footnote omitted). Witnesses who failed to claim the privilege were once said to have "waived" it, but we have recently abandoned this "vague term," *Green* v. *United States*, 355 U. S. 184, 191 (1957), and "made clear that an individual may lose the benefit of the privilege without making a knowing and intelligent waiver." *Garner* v. *United States, supra,* at 654, n. 9.

Although we have sometimes suggested in dicta that the usual rule might give way in situations where the government has "substantial reason to believe that the requested disclosures are likely to be incriminating," *Roberts* v. *United States,* 445 U. S. 552, 559 (1980), we have never adopted the view that a witness must "put the Government on notice by formally availing himself of the privilege" only when he alone "is reasonably aware of the incriminating tendency of the questions." *Id.,* at 562, n.* (BRENNAN, J., concurring). It has long been recognized that "[t]he Constitution does not forbid the asking of criminative questions," *United States* v. *Monia, supra,* at 433 (Frankfurter, J., dissenting), and nothing in our prior cases suggests that the incriminating nature of a question, by itself, excuses a timely assertion of the privilege. See, *e. g., United States* v. *Mandujano,* 425 U. S. 564, 574–575 (1976) (plurality opinion). If a witness—even one under a general compulsion to testify—answers a question that both he and the government should reasonably expect to incriminate him, the Court need ask only whether the particular disclosure was "compelled" within the meaning of the Fifth Amendment.

United States v. *Kordel, supra,* perhaps the first case squarely to hold that a witness under compulsion to make disclosures must assert the privilege in a timely manner, is illustrative. In answering interrogatories submitted by the Government in a civil case against a corporation, a corporate officer who had been notified of contemplated criminal action against him supplied evidence and leads helpful in securing his indictment and conviction. Although the relationship between the civil and criminal actions was clear and "[w]ithout question [the officer] could have invoked his Fifth Amendment privilege," *id.,* at 7, he did not do so. The Court concluded without hesitation that "[h]is failure at any time to assert the constitutional privilege leaves him in no position to complain now that he was compelled to give testimony against himself." *Id.*, at 10 (footnote omitted).

B

Thus it is that a witness confronted with questions that the government should reasonably expect to elicit incriminating evidence ordinarily must assert the privilege rather than answer if he desires not to incriminate himself. If he asserts the privilege, he "may not be required to answer a question if there is some rational basis for believing that it will incriminate him, at least without *at that time* being assured that neither it nor its fruits may be used against him" in a subsequent criminal proceeding. *Maness* v. *Meyers*, 419 U. S. 449, 473 (1975) (WHITE, J., concurring in result) (emphasis in original). But if he chooses to answer, his choice is considered to be voluntary since he was free to claim the privilege and would suffer no penalty as the result of his decision to do so. As the Minnesota Supreme Court recognized, application of this general rule is inappropriate in certain well-defined situations. In each of those situations, however, some identifiable factor "was held to deny the individual a 'free choice to admit, to deny, or to refuse to answer.'" *Garner* v. *United States*, *supra*, at 657 (quoting *Lisenba* v. *California*, 314 U. S. 219, 241 (1941)). Because we conclude that no such factor was present here, we hold that the Minnesota Supreme Court erred in excluding the probation officer's testimony.

1

A well-known exception to the general rule addresses the problem of confessions obtained from suspects in police custody.[5] Not only is custodial interrogation ordinarily conducted by officers who are "acutely aware of the potentially incriminatory nature of the disclosures sought," *Garner* v. *United States*, 424 U. S., at 657, but also the custodial setting is thought to contain "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Miranda* v. *Arizona*, 384 U. S., at 467. See *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 246–247 (1973). To dissipate "the overbearing compulsion . . . caused by isolation of a suspect in police custody," *United States* v. *Washington*, 431 U. S. 181, 187, n. 5 (1977), the *Miranda* Court required the exclusion of incriminating statements obtained during custodial interrogation unless the suspect fails to claim the Fifth Amendment privilege after being suitably warned of his right to remain silent and of the consequences of his failure to assert it. 384 U. S., at 467–469, 475–477. We have consistently held, however, that this extraordinary safeguard "does not apply outside the context of the inherently coercive custodial interrogations for which it was designed." *Roberts* v. *United States*, *supra*, at 560.

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[5] We emphasize that Murphy was not under arrest and that he was free to leave at the end of the meeting. A different question would be presented if he had been interviewed by his probation officer while being held in police custody or by the police themselves in a custodial setting.

The Minnesota Supreme Court recognized that Murphy was not "in custody" when he made his incriminating admissions. He was, to be sure, subject to a number of restrictive conditions governing various aspects of his life, and he would be regarded as "in custody" for purposes of federal habeas corpus. See *Jones* v. *Cunningham*, 371 U. S. 236, 241–243 (1963). But custody in that context has been defined broadly to effectuate the purposes of the writ, *id.*, at 243; *Hensley* v. *Municipal Court*, 411 U. S. 345, 349–351 (1973), and custody for *Miranda* purposes has been more narrowly circumscribed. See *Oregon* v. *Mathiason*, 429 U. S. 492 (1977) *(per curiam)*. Under the narrower standard appropriate in the *Miranda* context, it is clear that Murphy was not "in custody" for purposes of receiving *Miranda* protection since there was no "'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *Cali-*

fornia v. *Beheler*, 463 U. S. 1121, 1125 (1983) *(per curiam)* (quoting *Oregon* v. *Mathiason*, *supra*, at 495).

Notwithstanding the inapplicability of *Miranda*, the Minnesota Supreme Court held that the probation officer's failure to inform Murphy of the Fifth Amendment privilege barred use of his confession at trial. Four factors have been advanced in support of this conclusion, but we find them, alone or in combination, insufficient to excuse Murphy's failure to claim the privilege in a timely manner.

First, the probation officer could compel Murphy's attendance and truthful answers. The Minnesota Supreme Court failed to explain how this transformed a routine interview into an inherently coercive setting. In our view, this factor subjected Murphy to less intimidating pressure than is imposed on grand jury witnesses, who are sworn to tell the truth and placed in a setting conducive to truthtelling. Although warnings in both contexts might serve to dissipate "any possible coercion or unfairness resulting from a witness' misimpression that he must answer truthfully even questions with incriminat[ing] aspects," *United States* v. *Washington*, 431 U. S., at 188, we have never held that they must be given to grand jury witnesses, *id.*, at 186, and we decline to require them here since the totality of the circumstances is not such as to overbear a probationer's free will. See *Rogers* v. *Richmond*, 365 U. S. 534, 544 (1961).

Second, the probation officer consciously sought incriminating evidence. We have already explained that this factor does not give rise to a self-executing privilege, *supra*, at 428, and we pause here only to emphasize that police officers questioning persons suspected of crimes often consciously seek incriminating statements. The mere fact that an investigation has focused on a suspect does not trigger the need for *Miranda* warnings in noncustodial settings, *Beckwith* v. *United States*, 425 U. S. 341 (1976), and the probation officer's knowledge and intent have no bearing on the outcome of this case.

Third, Murphy did not expect questions about prior criminal conduct and could not seek counsel before attending the meeting. But the nature of probation is such that probationers should expect to be questioned on a wide range of topics relating to their past criminality. Moreover, the probation officer's letter, which suggested a need to discuss treatment from which Murphy had already been excused, would have led a reasonable probationer to conclude that new information had come to her attention. In any event, Murphy's situation was in this regard indistinguishable from that facing suspects who are questioned in noncustodial settings and grand jury witnesses who are unaware of the scope of an investigation or that they are considered potential defendants. See *United States* v. *Washington*, *supra*, at 188–189; *Beckwith* v. *United States*, *supra*, at 346–348.

Fourth, there were no observers to guard against abuse or trickery. Again, this often will be true when a suspect is subjected to noncustodial interrogation, where no warnings are required. Murphy does not allege that the probation officer was not legitimately concerned with the need for further treatment, and we cannot conclude that her actions would have led a reasonable probationer to believe that his statements to her would remain confidential. A probationer cannot pretend ignorance of the fact that his probation officer "is a peace officer, and as such is allied, to a greater or lesser extent, with his fellow peace officers." *Fare* v. *Michael C.*, 442 U. S. 707, 720 (1979). See *Cabell* v. *Chavez-Salido*, 454 U. S. 432, 447 (1982). Absent some express or implied promise to the contrary, he may also be charged with knowledge that "the probation officer is duty bound to report wrongdoing by the [probationer] when it comes to his attention, even if by communication from the [probationer] himself." *Fare* v. *Michael C.*, *supra*, at 720. The fact that Murphy apparently expressed no surprise on being informed that his statements would be made available to the police, moreover, strongly suggests that he was not misled by any expectation that his statements would remain confidential.

See App. to Pet. for Cert. C–21 (testimony of Mara Widseth); *id.*, at C–28 (testimony of Marshall Murphy).

Even a cursory comparison of custodial interrogation and probation interviews reveals the inaptness of the Minnesota Supreme Court's analogy to *Miranda*. Custodial arrest is said to convey to the suspect a message that he has no choice but to submit to the officers' will and to confess. *Miranda* v. *Arizona*, 384 U. S., at 456–457. It is unlikely that a probation interview, arranged by appointment at a mutually convenient time, would give rise to a similar impression. Moreover, custodial arrest thrusts an individual into "an unfamiliar atmosphere" or "an interrogation environment . . . created for no purpose other than to subjugate the individual to the will of his examiner." *Id.*, at 457. Many of the psychological ploys discussed in *Miranda* capitalize on the suspect's unfamiliarity with the officers and the environment. Murphy's regular meetings with his probation officer should have served to familiarize him with her and her office and to insulate him from psychological intimidation that might overbear his desire to claim the privilege. Finally, the coercion inherent in custodial interrogation derives in large measure from an interrogator's insinuations that the interrogation will continue until a confession is obtained. *Id.*, at 468. Since Murphy was not physically restrained and could have left the office, any compulsion he might have felt from the possibility that terminating the meeting would have led to revocation of probation was not comparable to the pressure on a suspect who is painfully aware that he literally cannot escape a persistent custodial interrogator.[6]

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[6] Neither the trial court nor the Minnesota Supreme Court found that Murphy believed that his probation could have been revoked for leaving the meeting or that he remained in the office for this reason. Since the meeting was scheduled at a mutually convenient time and was arranged pursuant to a request that did not include any threat, it is unlikely that Murphy believed that terminating the meeting would have jeopardized his probationary status.

We conclude, therefore, that Murphy cannot claim the benefit of the first exception to the general rule that the Fifth Amendment privilege is not self-executing.

2

The general rule that the privilege must be claimed when self-incrimination is threatened has also been deemed inapplicable in cases where the assertion of the privilege is penalized so as to "foreclos[e] a free choice to remain silent, and . . . compe[l] . . . incriminating testimony." *Garner* v. *United States*, 424 U. S., at 661. Because revocation of his probation was threatened if he was untruthful with his probation officer, Murphy argues that he was compelled to make incriminating disclosures instead of claiming the privilege. Although this contention is not without force, we find it unpersuasive on close examination.

In each of the so-called "penalty" cases, the State not only compelled an individual to appear and testify, but also sought to induce him to forgo the Fifth Amendment privilege by threatening to impose economic or other sanctions "capable of forcing the self-incrimination which the Amendment forbids." *Lefkowitz* v. *Cunningham*, 431 U. S. 801, 806 (1977). In most of the cases, the attempt to override the witnesses' privilege proved unsuccessful, and the Court ruled that the State could not constitutionally make good on its prior threat. *Lefkowitz* v. *Turley*, 414 U. S., at 79–84; *Sanitation Men* v. *Commissioner of Sanitation*, 392 U. S. 280, 283–284 (1968); *Gardner* v. *Broderick*, 392 U. S. 273, 278–279 (1968). These cases make clear that "a State may not impose substantial penalties because a witness elects to exercise his Fifth Amendment right not to give incriminating testimony against himself." *Lefkowitz* v. *Cunningham*, *supra*, at 805. Occasionally, however, an individual succumbed to the pressure placed upon him, failed to assert the privilege, and disclosed incriminating information, which the State later sought to use against him in a criminal prosecution. *Garrity* v. *New Jersey*, 385 U. S. 493 (1967), was such a case, and the Court held that an individual threatened with discharge from employment for exercising the privilege had not waived it by responding to questions rather than standing on his right to remain silent. *Id.*, at 498–499.

The threat of punishment for reliance on the privilege distinguishes cases of this sort from the ordinary case in which a witness is merely required to appear and give testimony. A State may require a probationer to appear and discuss matters that affect his probationary status; such a requirement, without more, does not give rise to a self-executing privilege. The result may be different if the questions put to the probationer, however relevant to his probationary status, call for answers that would incriminate him in a pending or later criminal prosecution. There is thus a substantial basis in our cases for concluding that if the State, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation, the failure to assert the privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution.[7]

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[7] The situation would be different if the questions put to a probationer were relevant to his probationary status and posed no realistic threat of incrimination in a separate criminal proceeding. If, for example, a residential restriction were imposed as a condition of probation, it would appear unlikely that a violation of that condition would be a criminal act. Hence, a claim of the Fifth Amendment privilege in response to questions relating to a residential condition could not validly rest on the ground that the answer might be used to incriminate if the probationer was tried for another crime. Neither, in our view, would the privilege be available on the ground that answering such questions might reveal a violation of the residential requirement and result in the termination of probation. Although a revocation proceeding must comport with the requirements of due process, it is not a criminal proceeding. *Gagnon* v. *Scarpelli*, 411 U. S. 778, 782 (1973); *United States* v. *Johnson*, 455 F. 2d 932, 933 (CA5), cert. denied, 409 U. S. 856 (1972). Just as there is no right to a jury trial before probation may be revoked, neither is the privilege against compelled self-incrimination available to a probationer. It follows that whether or not the answer to a question about a residential requirement is

Even so we must inquire whether Murphy's probation conditions merely required him to appear and give testimony about matters relevant to his probationary status or whether they went further and required him to choose between making incriminating statements and jeopardizing his conditional liberty by remaining silent. Because we conclude that Minnesota did not attempt to take the extra, impermissible step, we hold that Murphy's Fifth Amendment privilege was not self-executing.

As we have already indicated, Murphy was informed that he was required to be truthful with his probation officer in all matters and that failure to do so could result in revocation of probation. The opinion of the Minnesota Supreme Court made clear that this was indeed the case, but its conclusion that the probation officer's failure to give Murphy adequate warnings barred the use of his incriminating statements in the criminal trial did not rest on the ground that a refusal to furnish incriminating information would have justified revocation of probation. Although the court recognized that imposing a penalty for a valid exercise of the Fifth Amendment

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compelled by the threat of revocation, there can be no valid claim of the privilege on the ground that the information sought can be used in revocation proceedings.

Our cases indicate, moreover, that a State may validly insist on answers to even incriminating questions and hence sensibly administer its probation system, as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination. Under such circumstances, a probationer's "right to immunity as a result of his compelled testimony would not be at stake," *Sanitation Men* v. *Commissioner of Sanitation*, 392 U. S. 280, 284 (1968); see *Lefkowitz* v. *Cunningham*, 431 U. S. 801, 805–806 (1977); *Lefkowitz* v. *Turley*, 414 U. S. 70, 84–85 (1973); *Gardner* v. *Broderick*, 392 U. S. 273, 278 (1968), and nothing in the Federal Constitution would prevent a State from revoking probation for a refusal to answer that violated an express condition of probation or from using the probationer's silence as "one of a number of factors to be considered by the finder of fact" in deciding whether other conditions of probation have been violated. *Lefkowitz* v. *Cunningham*, *supra*, at 808, n. 5. See *Baxter* v. *Palmigiano*, 425 U. S. 308, 317–318 (1976).

privilege could impermissibly foreclose a free choice to remain silent, 324 N. W. 2d, at 342–343, it did not purport to find that Minnesota's probation revocation statute had such an effect. The court relied instead on the fact that Murphy was under legal compulsion to attend the meeting and to answer truthfully the questions of a probation officer who anticipated incriminating answers. *Id.*, at 344. Such compulsion, however, is indistinguishable from that felt by any witness who is required to appear and give testimony, and, as we have already made clear, it is insufficient to excuse Murphy's failure to exercise the privilege in a timely manner.

The state court did not attempt to define the precise contours of Murphy's obligation to respond to questions. On its face, Murphy's probation condition proscribed only false statements; it said nothing about his freedom to decline to answer particular questions and certainly contained no suggestion that his probation was conditional on his waiving his Fifth Amendment privilege with respect to further criminal prosecution. "At this point in our history virtually every schoolboy is familiar with the concept, if not the language, of the [Fifth Amendment]." *Michigan* v. *Tucker*, 417 U. S. 433, 439 (1974). Yet Murphy, although he had a right to do so, see *State* v. *Austin*, 295 N. W. 2d 246 (Minn. 1980), did not seek clarification of the condition. Without the benefit of an authoritative state-court construction of the condition, we are hesitant to read into the truthfulness requirement an additional obligation that Murphy refrain from raising legitimate objections to furnishing information that might lead to his conviction for another crime.

Whether we employ a subjective or an objective test, there is no reasonable basis for concluding that Minnesota attempted to attach an impermissible penalty to the exercise of the privilege against self-incrimination. There is no direct evidence that Murphy confessed because he feared that his probation would be revoked if he remained silent. Unlike the police officers in *Garrity* v. *New Jersey*, 385 U. S. 493

(1967), Murphy was not expressly informed during the crucial meeting with his probation officer that an assertion of the privilege would result in the imposition of a penalty. And the fact that Murphy apparently felt no compunction about adamantly denying the false imprisonment charge on which he had been convicted before admitting to the rape and murder strongly suggests that the "threat" of revocation did not overwhelm his resistance.

If Murphy did harbor a belief that his probation might be revoked for exercising the Fifth Amendment privilege, that belief would not have been reasonable. Our decisions have made clear that the State could not constitutionally carry out a threat to revoke probation for the legitimate exercise of the Fifth Amendment privilege. It is not surprising, then, that neither the state court nor any state officer has suggested otherwise. Indeed, in its brief in this Court, the State submits that it would not, and legally could not, revoke probation for refusing to answer questions calling for information that would incriminate in separate criminal proceedings. Brief for Petitioner 36–39, and n. 7. See also Tr. of Oral Arg. 7–8, 10–14.

Minnesota's revocation statute, which was accurately summarized in Murphy's notice of probation, see App. to Pet. for Cert. C–33—C–34, authorizes revocation "[w]hen it appears that the defendant has violated any of the conditions of his probation or has otherwise been guilty of misconduct which warrants the imposing or execution of sentence." Minn. Stat. § 609.14 (1982). Revocation is not automatic under this provision. Even if the probation officer desires revocation, a probationer must be afforded a hearing, *Pearson* v. *State*, 308 Minn. 287, 289–290, 241 N. W. 2d 490, 492–493 (1976); *State ex rel. Halverson* v. *Young*, 278 Minn. 381, 386–387, 154 N. W. 2d 699, 702–703 (1967), and the court must find that he violated a specific condition, that the violation was intentional or inexcusable, and that the need for confinement outweighs the policies favoring probation. *State* v. *Austin*, *supra,* at 250. We have not been advised of any case in which Minnesota has attempted to revoke probation merely because a probationer refused to make nonimmunized disclosures concerning his own criminal conduct; and, in light of our decisions proscribing threats of penalties for the exercise of Fifth Amendment rights, Murphy could not reasonably have feared that the assertion of the privilege would have led to revocation.

Accordingly, we cannot conclude that Murphy was deterred from claiming the privilege by a reasonably perceived threat of revocation.

3

A third exception to the general requirement of a timely assertion of the Fifth Amendment privilege, closely related to the penalty exception, has been developed in the context of the federal occupational and excise taxes on gamblers. In recognition of the pervasive criminal regulation of gambling activities and the fact that claiming the privilege in lieu of filing a return would tend to incriminate, the Court has held that the privilege may be exercised by failing to file. *Marchetti* v. *United States,* 390 U. S. 39 (1968); *Grosso* v. *United States,* 390 U. S. 62 (1968). See also *Mackey* v. *United States,* 401 U. S. 667 (1971).

> "[M]aking a claim of privilege when the disclosures were requested, *i. e.,* when the returns were due, would have identified the claimant as a gambler. The Court therefore forgave the usual requirement that the claim of privilege be presented for evaluation in favor of a 'claim' by silence. . . . If a particular gambler would not have incriminated himself by filing the tax returns, the privilege would not justify a failure to file." *Garner* v. *United States,* 424 U. S., at 658–659, n. 11.

But, while a taxpayer who claims the privilege instead of filing gambling tax returns necessarily identifies himself as a gambler, a probationer confronted with incriminating questions ordinarily will have no problem effectively claiming the privilege at the time disclosures are requested. There exists, therefore, no reason to forgive the requirement that the claim be presented for evaluation in a timely manner.[8]

III

We conclude, in summary, that since Murphy revealed incriminating information instead of timely asserting his Fifth Amendment privilege, his disclosures were not compelled incriminations. Because he had not been compelled to incriminate himself, Murphy could not successfully invoke the privilege to prevent the information he volunteered to his probation officer from being used against him in a criminal prosecution.

The judgment of the Minnesota Supreme Court is

Reversed.

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[8] Nothing in *Mackey* v. *United States*, 401 U. S. 667 (1971), requires a different conclusion. In that case, which arose before the Court recognized a privilege not to file gambling tax returns, the taxpayer filed a return that was introduced as evidence in a criminal prosecution for income tax evasion. A majority of the Court considered the disclosures to have been compelled incriminations, *id.*, at 672 (plurality opinion); *id.*, at 704–705 (BRENNAN, J., concurring in judgment); *id.*, at 713 (Douglas, J., dissenting), but the taxpayer was not immunized against their use because *Marchetti* and *Grosso* were not given retroactive effect. 401 U. S., at 674–675 (plurality opinion); *id.*, at 700–701 (Harlan, J., concurring in judgment). Even assuming that the taxpayer's disclosures would have been excluded if we had applied *Marchetti* and *Grosso* retroactively, "[i]t does not follow necessarily that a taxpayer would be immunized against use of disclosures made on gambling tax returns when the Fifth Amendment would have justified a failure to file at all." *Garner* v. *United States*, 424 U. S. 648, 659, n. 13 (1976). In other words, a taxpayer making incriminating disclosures on a return filed after *Marchetti* and *Grosso* could not necessarily prevent the use of those disclosures in a criminal prosecution because he had been afforded an effective way to assert the privilege. Murphy's situation, we believe, is analogous to that of the post-*Marchetti* taxpayer: Since he could have asserted the privilege effectively but failed to do so, his disclosures cannot be viewed as compelled incriminations.

JUSTICE MARSHALL, with whom JUSTICE STEVENS joins, and with whom JUSTICE BRENNAN joins except as to Part II–A, dissenting.

The opinion of the Court helpfully clarifies the scope of the privilege against self-incrimination that may be asserted by a probationer when asked questions by an officer of the State. As the majority points out, two principles shape the probationer's constitutional rights. First, because probation revocation proceedings are not criminal in nature, *Gagnon* v. *Scarpelli*, 411 U. S. 778, 782 (1973), and because the Fifth Amendment ban on compelled self-incrimination applies only to criminal proceedings, the possibility that a truthful answer to a question might result in the revocation of his probation does not accord the probationer a constitutional right to refuse to respond. *Ante*, at 435–436, n. 7. Second, a probationer retains the privilege enjoyed by all citizens to refuse "to answer official questions put to him in any . . . proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings," *Lefkowitz* v. *Turley*, 414 U. S. 70, 77 (1973). *Ante*, at 426.

From the foregoing propositions, it follows that the power of a State to compel a probationer to answer a given question varies depending upon the manner in which the probationer's answer might incriminate him. If a truthful response might reveal that he has violated a condition of his probation but would not subject him to criminal prosecution, the State may insist that he respond and may penalize him for refusing to do so.[1] See *ante*, at 435–436, n. 7. By contrast, if there is a chance that a truthful answer to a given question would expose the probationer to liability for a crime different from the crime for which he has already been convicted, he has a right to refuse to answer and the State may not attempt to coerce him to forgo that right.[2] See *ante*, at 435. As the majority points out, if the answer to a question might lead both to criminal sanctions and to probation revocation, the State has the option of insisting that the probationer respond, in return for an express guarantee of immunity from criminal liability.[3] *Ante*, at 436, n. 7. Unless it exercises that option, however, the State may not interfere with the probationer's right "to remain silent unless he chooses to speak in the unfettered exercise of his own will," *Malloy* v. *Hogan*, 378 U. S. 1, 8 (1964).

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[1] This is not to suggest that a State must or should organize its probation system in a fashion that compels probationers to respond under these circumstances, only that a State is not prevented by the Federal Constitution from doing so.

The flaw in the opinion of the Court lies not in its analysis of the constitutional rights available to a probationer, but in its finding that those rights were not violated in this case. The majority concludes that, "since Murphy revealed incriminating information instead of timely asserting his Fifth Amendment privilege, his disclosures were not compelled incriminations." *Ante*, at 440. In my view, that conclusion is inconsistent with our prior cases dealing with invocations of the Fifth Amendment. For two independent reasons, Murphy's failure to claim his privilege against self-incrimination before responding to his probation officer's inquiry regarding his participation in the 1974 murder did not result in the forfeiture of his right to object to the use of his admissions in a subsequent criminal prosecution. First, the State of Minnesota had threatened Murphy with a penalty for refusing to respond to questions; our decisions make clear that such a threat relieves its target of the duty to claim the benefit of the Fifth Amendment. Second, under the circumstances of this case, the State was obliged to prove that Murphy was aware of his constitutional rights and freely waived them; by showing nothing more than that Murphy failed to assert his privilege before answering, the State failed to carry its burden.

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[2] It makes no difference whether the criminal conduct that the probationer might reveal was committed before or after the crime for which he was convicted or before or after the conviction itself.

[3] JUSTICE BRENNAN and I remain persuaded that "the Fifth Amendment's privilege against self-incrimination requires that any jurisdiction that compels a man to incriminate himself grant him absolute immunity under its laws from prosecution for any transaction revealed in that testimony." *Piccirillo* v. *New York*, 400 U. S. 548, 562 (1971) (BRENNAN, J., joined by MARSHALL, J., dissenting). A majority of the Court, however, adheres to the view that the constitutional prohibition is not violated as long as the witness is accorded immunity against the use, in a criminal prosecution, of his testimony or the fruits thereof. See, *e. g.*, *Lefkowitz* v. *Turley*, 414 U. S. 70, 84 (1973).

I

As the majority acknowledges, if an officer of a State asks a person a question under circumstances that deprive him of a "'free choice to admit, to deny, or to refuse to answer,'" and he answers the question without attempting to assert his privilege against self-incrimination, his response will be deemed to have been "compelled" and will be inadmissible as evidence against him. *Garner* v. *United States*, 424 U. S. 648, 656–657 (1976) (quoting *Lisenba* v. *California*, 314 U. S. 219, 241 (1941)); see *ante*, at 429. Our cases make clear that the State will be found to have deprived the person of such a "free choice" if it threatens him with a substantial sanction if he refuses to respond. *Lefkowitz* v. *Turley*, 414 U. S., at 82–83. Two rules flow from the foregoing principle: If the State presents a person with the "Hobson's choice" of incriminating himself or suffering a penalty, and he nevertheless refuses to respond, the State cannot constitutionally make good on its threat to penalize him. *Id.*, at 77; *Sanitation Men* v. *Commissioner of Sanitation*, 392 U. S. 280, 284 (1968); *Gardner* v. *Broderick*, 392 U. S. 273, 277–278 (1968). Conversely, if the threatened person decides to talk instead of asserting his privilege, the State cannot use his admissions against him in a subsequent criminal prosecution. *Garrity* v. *New Jersey*, 385 U. S. 493, 500 (1967).

It might appear that these two rules would defeat one another. A person presented with what appears to be a Hobson's choice could be charged with the knowledge that, under this Court's precedents, he may choose either option with impunity. His awareness that the State can use neither his silence nor his confessions against him would seem to eliminate the "compulsion" supposedly inherent in the situation.[4] More specifically, it might be argued that, because it is now settled that a person cannot be penalized for asserting his Fifth Amendment privilege, if he decides to talk rather than assert his constitutional right to remain silent, his statements should be deemed voluntary.

This Court has consistently refused to allow the two rules to undercut each other in this way.[5] Our refusal derives from two considerations. First, many—probably most—of the persons threatened with sanctions if they refuse to answer official questions lack sufficient knowledge of this Court's decisions to be aware that the State's threat is idle. Second, the State's *attempt* to coerce self-incriminating statements by promising to penalize silence is itself constitutionally offensive, and the mere possibility that the State profited from the attempt is sufficient to forbid it to make use of the admissions it elicited. See *Gardner* v. *Broderick*, *supra*, at 279.

For similar reasons, when a person who has been threatened with a penalty makes self-incriminating statements, we have declined to inquire whether his decision to speak was the proximate result of the threat. In most cases, it would be difficult for the person to prove that, but for the threat, he would have held his peace and that no other intervening causes (such as pangs of conscience) induced him to confess.[6] The State, having exerted pressures repugnant to the Constitution, should not be allowed to profit from the uncertainty whether those pressures had their intended effect. Sensitivity to the foregoing concerns is reflected in our decision in *Garrity* v. *New Jersey*, *supra.* The petitioners in that case had never argued that their confessions were in fact induced by the State's warning that they might be fired if they refused to answer, and the lower courts had not so found.[7] Nevertheless, the Court concluded that the petitioners' statements "were infected by the coercion inherent in this scheme of questioning and cannot be sustained as voluntary." *Id.*, at 497–498 (footnote omitted).

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[4] See Friendly, The Fifth Amendment Tomorrow: The Case for Constitutional Change, 37 U. Cin. L. Rev. 671, 708 (1968); *Spevak* v. *Klein*, 385 U. S. 511, 531 (1967) (WHITE, J., dissenting).

[5] Thus, in *Lefkowitz* v. *Turley*, *supra*, the Court described its prior decision in *Gardner* v. *Broderick*, 392 U. S. 273 (1968), in the following terms: "Although under *Garrity* any waiver executed may have been invalid and any answers elicited inadmissible in evidence, the State did not purport to recognize as much and instead attempted to coerce a waiver on the penalty of loss of employment. . . . Hence, the State's statutory provision requiring [appellant's] dismissal for his refusal to waive immunity could not stand." 414 U. S., at 80–81. In the same opinion, the Court acknowledged that the rule announced in *Garrity* itself remained good law. See 414 U. S., at 79–80, 82. The Court today does not question the vitality of either the line of cases originating in *Gardner* or the line originating in *Garrity*.

In sum, the majority errs when it suggests that, to claim the benefit of the Fifth Amendment, a person who made self-incriminating statements after being threatened with a penalty if he remained silent must show that his apprehension that the State would carry out its promise was objectively "reasonable," *ante*, at 438. Our decisions make clear that the threat alone is sufficient to render all subsequent testimony "compelled." See *supra*, at 443–444.[8] Likewise, the majority errs when it implies that a defendant has a duty to prove that the State's threat, and not some other motivation, prompted his confession, see *ante*, at 437–438. Under our precedents, the defendant need only prove that the State presented him with a constitutionally impermissible choice and that he thereupon incriminated himself. See *supra*, at 444–445.

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[6] Such proof would be especially difficult in cases in which the defendant has confessed to a serious crime, thereby subjecting himself to a penalty—in the form of protracted incarceration—far more severe than the penalty that the State threatened to impose if he refused to answer. Despite the implausibility, under such circumstances, of an allegation that the State's threat induced the confession, we have never suggested that the defendant would be unable to avail himself of the doctrine enunciated in *Garrity*. Indeed, the situation presented in *Garrity* itself fits the scenario just described.

[7] As Justice Harlan observed in dissent: "All of the petitioners consented to give statements, none displayed any significant hesitation, and none suggested that the decision to offer information was motivated by the possibility of discharge." 385 U. S., at 505. The majority did not question Justice Harlan's description of the case.

When the foregoing principles are applied to this case, it becomes clear that Murphy's confession to the 1974 murder must be deemed to have been "compelled." When Murphy was placed on probation, he was given a letter setting forth the conditions under which he was discharged. The pertinent portions of the letter provide:

> "For the present you are only conditionally released. If you comply with the conditions of your probation you may expect to be discharged at the expiration of the period stated. If you fail to comply with the requirements you may be returned to Court at any time for further hearing or commitment. . . .
>
> "It will be necessary for you to obey strictly the following conditions:
>
> "BE TRUTHFUL to your Probation Officer in all matters." App. to Pet. for Cert. C–33—C–34 (emphasis in original).

Murphy was required to sign the letter, attesting that he had read and understood the instructions. *Id.*, at C–35.

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[8] Cf. *Escobedo* v. *Illinois*, 378 U. S. 478, 499 (1964) (WHITE, J., dissenting) ("If an accused is told he must answer and does not know better, it would be very doubtful that the resulting admissions could be used against him").

A similar principle obtains in the Fourth Amendment context. It is well established that a "consent" to a search that consists of nothing more than submission to the "presumed authority" of a colorably valid search warrant is invalid. *E. g., Lo-Ji Sales, Inc.* v. *New York*, 442 U. S. 319, 329 (1979); *Bumper* v. *North Carolina*, 391 U. S. 543, 548–549 (1968).

The majority contends that the foregoing passages merely required Murphy to answer nonincriminating questions and forbade him to make false statements to his probation officer. *Ante*, at 437. The majority's interpretation, which is essential to its result, is simply incredible. A reasonable layman would interpret the imperative, "be truthful . . . in all matters," as a command to answer honestly all questions presented. Any ambiguity inherent in the language of the directive is dispelled by its context. The duty to be truthful in dealings with the probation officer is listed as the first term of the conditions of probation. The critical phrase is capitalized. And the injunction is immediately preceded by an instruction "to obey strictly the following conditions."[9]

In short, the State of Minnesota presented Murphy with a set of official instructions that a reasonable man would have interpreted to require him, upon pain of the revocation of his probation, to answer truthfully all questions asked by his probation officer.[10] Probation revocation surely constitutes a

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[9] The Solicitor General observes: "Citizens are often required to be truthful in their dealings with the government; any person commits a crime if, for example, he makes a false statement to a federal law enforcement officer in connection with a matter within the officer's jurisdiction. 18 U. S. C. 1001." Brief for United States as *Amicus Curiae* 19. It is precisely because such proscriptions on lying to government officials are so common that the emphatic injunction contained in Murphy's probation conditions must be interpreted to impose on him more extensive obligations.

[10] At the time Murphy made his confession, no Minnesota court had authoritatively interpreted either the probation condition at issue or the Minnesota statute from which it derives. Nor can a definitive construction of these crucial aspects of state law be found in the opinions of either the trial court or the Minnesota Supreme Court in this case. After cataloging the considerations on which it founded its ruling that Murphy's confession was admissible, the trial court observed: "Against these factors is the fact that a condition of his probation was that he be honest with his probation officer, and that he was there ostensibly to discuss further treatment in regard to his current probation. Failure to follow through with either of these could have resulted in revocation of the probation and potential imprisonment." App. to Pet. for Cert. B-14. The foregoing

"substantial sanction."[11] Under our precedents, therefore, by threatening Murphy with that sanction if he refused to answer, Minnesota deprived itself of constitutional authority to use Murphy's subsequent answers in a criminal prosecution against him.

The majority's efforts to avoid that conclusion are unpersuasive. First, the majority faults Murphy for failing to ask his probation officer for a "clarification" of the terms of his probation. *Ante*, at 437. The letter by which the State informed Murphy of the terms of his probation contained no suggestion that he was entitled to such a "clarification"; on the contrary, the letter informed Murphy that he was required to "obey strictly" the conditions enumerated and that failure to do so might result in his "commitment." More importantly, as indicated above, our decisions establish that a

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passage suggests that the trial court assumed that Murphy was under a duty to answer all questions presented by his probation officer, but is too ambiguous to be fairly relied upon as an "interpretation" of the probation condition. Because the State Supreme Court held Murphy's confession inadmissible for different reasons, it did not have occasion to decide whether a refusal to answer the questions asked by his probation officer would have exposed Murphy to revocation of his probation. The majority professes to be "hesitant," "[w]ithout the benefit of an authoritative state-court construction of the condition," to construe it to impose upon Murphy a duty to answer in addition to a duty not to lie. *Ante*, at 437. For the reasons indicated in the text, I do not share the majority's hesitation; it seems to me clear that a reasonable man would have interpreted the letter to require him to answer all questions. But even if I agreed that the import of the crucial phrase is not apparent, I would object to the majority's disposition of the case. The proper course would be to remand to the Minnesota Supreme Court to allow it to provide an "authoritative construction" of the provisions of state law around which the dispute revolves.

[11] Even the critics of the line of cases forbidding use of statements made after a State threatened a witness with an economic sanction acknowledge that a State may not threaten to put a person in jail for refusing to answer questions. See Friendly, 37 U. Cin. L. Rev., at 676; Greenawalt, Silence as a Moral and Constitutional Right, 23 Wm. & Mary L. Rev. 15, 66–68 (1981).

person told by the State that he may be penalized for refusing to answer does not bear the responsibility to determine whether the State would or could make good on its threat. See *supra*, at 443–444. Second, the majority relies on the absence of "direct evidence that Murphy confessed because he feared that his probation would be revoked if he remained silent." *Ante*, at 437. Under our precedents, no such "direct evidence" of a causal link between the threat and the response is required in order to prevent the use in a criminal prosecution of Murphy's confession. See *supra*, at 444–445.

In conclusion, because the terms of Murphy's probation deprived him of "a free choice to admit, to deny, or to refuse to answer" when his probation officer confronted him with the allegation that he had committed the 1974 murder, our decisions forbid the introduction into evidence against him of his confession.

II

Even if Minnesota had not impaired Murphy's freedom to respond or to refuse to respond to incriminating questions regarding the 1974 murder, I would hold his confession inadmissible because, in view of the circumstances under which he was interrogated, the State had a duty to prove that Murphy waived his privilege against self-incrimination, and it has not made such a showing.

A

It is now settled that, in most contexts, the privilege against self-incrimination is not self-executing. "[I]n the ordinary case," if a person questioned by an officer of the State makes damaging disclosures instead of asserting his privilege, he forfeits his right to object to subsequent use of his admissions against him. *Garner* v. *United States*, 424 U. S., at 654. This forfeiture occurs even if the person is subject to a general legal duty to respond to the officer's questions. See *United States* v. *Washington*, 431 U. S. 181 (1977); *ante*, at 427. And it occurs regardless of whether the person's failure to claim the privilege was founded upon a knowing and intelligent decision to waive his constitutional right not to answer those questions that might incriminate him. *Garner* v. *United States*, *supra*, at 654, n. 9; see also *ante*, at 427–428.

At first blush, this harsh doctrine seems incompatible with our repeated assertions of the importance of the Fifth Amendment privilege in our constitutional scheme. Twenty years ago, we observed:

> "[T]he American system of criminal prosecution is accusatorial, not inquisitorial, and . . . the Fifth Amendment privilege is its essential mainstay. . . . Governments, state and federal, are thus constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth." *Malloy* v. *Hogan*, 378 U. S., at 7–8 (citation omitted).

In view of our continued adherence to the foregoing principles,[12] it appears anomalous that, in most contexts, we allow governments to take advantage of witnesses' failure, sometimes as a result of ignorance or momentary inattention, to claim the benefit of the privilege in a "timely" fashion.

The explanation for our seemingly callous willingness to countenance forfeitures of Fifth Amendment rights must be sought in a combination of three factors. First and most importantly, we presume that most people are aware that they need not answer an official question when a truthful answer might expose them to criminal prosecution. "At this point in our history virtually every schoolboy is familiar with the concept, if not the language," of the constitutional ban on compelled self-incrimination. *Michigan* v. *Tucker*, 417 U. S. 433, 439 (1974). We thus take for granted that, in most instances, when a person discloses damaging information in response to an official inquiry, he has made an intelligent decision to waive his Fifth Amendment rights.

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[12] See, *e. g.*, *Garner* v. *United States*, 424 U. S., at 655–656.

Second, in the vast majority of situations in which an officer of the State asks a citizen a question, the officer has no reason to know that a truthful response would reveal that the citizen has committed a crime. Under such circumstances, one of the central principles underlying the Fifth Amendment—that governments should not "deliberately see[k] to avoid the burdens of independent investigation by compelling self-incriminating disclosures"—has little relevance. *Garner* v. *United States*, *supra*, at 655–656. Thus, in the ordinary case, few constitutional values are threatened when the government fails to preface an inquiry with an explicit reminder that a response is not required if it might expose the respondent to prosecution.

Third, a general requirement that government officials preface all questions with such reminders would be highly burdensome. Our concern with the protection of constitutional rights should not blind us to the fact that, in general, governments have the right to everyone's testimony. *E. g.*, *Branzburg* v. *Hayes*, 408 U. S. 665, 688 (1972). A rule requiring officials, before asking citizens for information, to tell them that they need not reveal incriminating evidence would unduly impede the capacity of government to gather the data it needs to function effectively.[13]

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[13] It might be argued that no such general rule would be required to ensure that persons did not incriminate themselves without first making intelligent decisions to waive their constitutional rights. All that would be necessary would be a rule forbidding the State to make any use of a self-incriminating disclosure in a prosecution against its maker *unless* he had been reminded of his privilege before making the statement. The police (and other officials) would be free to ask questions without accompanying warnings. If a person questioned made damaging disclosures, the State could not use his statements against him, but the State would thereby be in no worse a position than if the questions had not been asked at all. The police would simply be obliged thereupon to conduct an independent inves-

In sum, a general rule requiring the prosecution, before introducing a confession, to prove that the defendant intelligently and voluntarily waived his right not to incriminate himself would protect few persons (because most know their legal rights), would do little to promote the values that underlie the Fifth Amendment, and would substantially impair the information-gathering capacity of government.[14]

It should be apparent that these considerations do not apply with equal force in all contexts. Until today, the Court has been sensitive to variations in their relevance and strength. Accordingly, we have adhered to the general principle that a defendant forfeits his privilege if he fails to assert it before making incriminating statements only in situations implicating several of the factors that support the principle. More specifically, we have applied the principle only in cases in which at least two of the following statements have been true: (a) At the time the damaging disclosures were made, the defendant's constitutional right not to make them was clearly established. (b) The defendant was given sufficient warning that he would be asked potentially incrimi-

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tigation, and to secure a conviction on the basis of "evidence independently and freely secured," see *Malloy* v. *Hogan*, 378 U. S. 1, 8 (1964).

The response to the foregoing argument is that, in a situation of the sort just described, the State would indeed be in a significantly worse position than if the questions had not been asked. The reason is that, in a subsequent prosecution, the State would bear the burden of proving that it made no use whatever of the incriminating disclosures. See *Kastigar* v. *United States*, 406 U. S. 441, 460 (1972). The difficulty of sustaining that burden would often be such as wholly to frustrate prosecution. See Westen & Mandell, To Talk, To Balk, or To Lie: The Emerging Fifth Amendment Doctrine of the "Preferred Response," 19 Am. Crim. L. Rev. 521, 531–532 (1982). Desire to avoid such situations would induce government officials either to preface their questions with warnings or to refrain from asking them at all. The net effect would be to reduce the capacity of government to obtain needed information.

[14] Cf. *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 227–234, 242 (1973) (refusing, for similar reasons, to adopt a waiver standard for testing the voluntariness of consents to searches).

nating questions to be able to secure legal advice and to reflect upon how he would respond. (c) The environment in which the questions were asked did not impair the defendant's ability intelligently to exercise his rights. (d) The questioner had no reason to assume that truthful responses would be self-incriminating.

A review of a few of the leading cases should suffice to establish the point.[15] In *United States* v. *Kordel*, 397 U. S. 1 (1970), the Government submitted interrogatories to the defendant in a civil suit. Though the defendant (a corporate officer) was aware that the Government was planning to bring a criminal action against him, he answered the questions instead of asserting his privilege against self-incrimination. The Court ruled that his answers could be admitted in the ensuing prosecution. In so holding, the Court emphasized the facts that established law made clear that the defendant had a constitutional right to refuse to answer the interrogatories, that he was free to consult with counsel before responding, and that nothing in the circumstances under which the questions were presented impaired the defendant's ability to appreciate the consequences of his actions. *Id.*, at 7, 9–10.

The defendant in *Garner* v. *United States*, 424 U. S. 648 (1976), was a professional gambler who made incriminating disclosures on his Form 1040 income tax returns. The Court held that he could be prosecuted partly on the basis of his admissions. Though the defendant's constitutional right to refuse to provide the requested information was perhaps less clear and straightforward than the right of the usual defendant, the Court stressed that other factors rendered inexcusable his failure to learn and assert his entitlements. Thus, the Court pointed out that the defendant was free to consult with a lawyer and could fill out the tax return at his leisure in an environment of his choosing. *Id.*, at 658. Moreover, every taxpayer is required to fill out a Form 1040; the Government, in imposing that duty, has no reason to assume that any given taxpayer's responses will be self-incriminating.[16] Thus, the United States in *Garner* could not be faulted for requesting the information that the defendant provided.

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[15] I do not renounce the views I expressed in concurrence or dissent in several of the cases discussed below. My purpose in canvassing the relevant decisions is simply to demonstrate that, even under the analysis adopted by the majorities in those cases, the result reached by the Court today is wrong.

Finally, in *United States* v. *Washington*, 431 U. S. 181 (1977), the Court confirmed the proposition that a witness called to testify before a grand jury must claim the benefit of the privilege or forfeit it.[17] The Court acknowledged that "the grand jury room engenders an atmosphere conducive to truthtelling" and thus might have exerted some pressure on the defendant not to assert his rights. *Id.*, at 187. In addition, the Court recognized that the Government was not blameless insofar as a criminal investigation had focused on the defendant and thus the questioners had ample reason to believe that truthful answers by the defendant would be self-incriminating.[18] But, the Court reasoned, the situation contained other safeguards that warranted adherence to the principle that a privilege not asserted is lost. First, the defendant's right to refuse to respond had been perfectly clear; indeed, at the outset of the proceeding, the defendant had been explicitly warned of his right not to answer questions if his responses might incriminate him. *Id.*, at 186, 188.[19] Second, not only had the defendant been afforded an opportunity before appearing to seek legal advice, but also, at the start of the hearing, he was told that a lawyer would be provided for him if he wished and could not afford one. *Id.*, at 183–184. Under those circumstances, the Court concluded that it was inconceivable that the defendant's decision not to assert his privilege was uninformed or involuntary.[20]

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[16] Cf. *United States* v. *Oliver*, 505 F.2d 301, 306–308 (CA7 1974) (Stevens, J.) (distinguishing, for Fifth Amendment purposes, income reporting statutes "designed to procure incriminating disclosures from a select group of persons engaged in criminal conduct" and reporting statutes "applicable to the public at large, . . . [whose] demands for information are neutral in the sense that they apply evenly to the few who have illegal earnings and the many who do not").

[17] Prior to *Washington*, that proposition had frequently been advanced in dictum. See, *e. g.*, *United States* v. *Mandujano*, 425 U. S. 564, 574–575 (1976) (dictum); *Rogers* v. *United States*, 340 U. S. 367, 370 (1951) (alternative holding); *United States* v. *Monia*, 317 U. S. 424, 427 (1943) (dictum).

[18] JUSTICE BRENNAN and I remain convinced that the fact that a criminal investigation has focused on a grand jury witness is sufficient to tip the constitutional balance in favor of a requirement that the prosecution prove that any damaging disclosures made by the witness were founded upon a knowing and intelligent waiver of the witness' rights. See 431 U. S., at 191 (BRENNAN, J., joined by MARSHALL, J., dissenting); *United States* v. *Mandujano*, *supra*, at 596–602 (BRENNAN, J., joined by MARSHALL, J.,

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concurring in judgment). However, the argument advanced in the text does not depend upon that conviction.

[19] The Court declined, however, to decide whether such warnings were constitutionally required. 431 U. S., at 186, 190.

[20] See also *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U. S. 103, 113 (1927) (defendant who made incriminating disclosures when questioned by an immigration inspector deemed (in dictum) to have waived his privilege when his right to refuse to answer was clear, he had been given adequate notice of the sort of questions he would be asked, and he was represented by counsel at the hearing); *United States* v. *Murdock*, 284 U. S. 141, 148 (1931) (when defendant was summoned to appear before revenue agent, consulted with counsel just prior to the interview, and clearly had a right not to incriminate himself, his failure to invoke the Fifth Amendment as a justification for his refusal to answer resulted in a waiver of his privilege) (dictum); *Beckwith* v. *United States*, 425 U. S. 341 (1976) (incriminating disclosures made by taxpayer who was interviewed in his home and place of business by Internal Revenue agents after being reminded of his Fifth Amendment rights held admissible in a prosecution against him); *Oregon* v. *Mathiason*, 429 U. S. 492 (1977) *(per curiam)* (parolee's confession to a police officer held admissible where parolee was not in custody at the time of the questioning, parolee had ample warning that he would be asked incriminating questions, and parolee was clearly entitled to refuse to respond); *Roberts* v. *United States*, 445 U. S. 552, 559 (1980) (in a case in which the Government had "no substantial reason to believe that the requested disclosures [were] likely to be incriminating," and the defendant clearly had a right not to incriminate himself, the defendant's

By contrast, in cases in which only one of the statements enumerated above, see *supra*, at 452–453, has been true, the Court has refused to adhere to the general rule that a privilege not claimed is lost, and instead has insisted upon a showing that the defendant made a knowing and intelligent decision to forgo his constitutional right not to incriminate himself. The classic situation of this sort is custodial interrogation. In *Miranda* v. *Arizona*, 384 U. S. 436 (1966), the Court acknowledged that the right of a suspect in police custody not to answer questions is well established. However, we stressed that other aspects of the situation impair the ability of the suspect to exercise his rights and threaten the values underlying the Fifth Amendment: the suspect is unable to consult with counsel regarding how he should respond to questions; the environment in which the questions are presented (the police station, from which the suspect is forbidden to leave) "work[s] to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely," *id.*, at 467; and the interrogators are well aware that truthful answers to their questions are likely to incriminate the suspect. In short, only one of the four circumstances favoring application of the general principle exist in the context of custodial interrogation. To mitigate the risk that suspects would ignorantly or involuntarily fail to claim their privilege against self-incrimination under these circumstances, the Court in *Miranda* imposed a requirement

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refusal to answer *without* asserting his privilege held properly used against him in the determination of his sentence).

The presence of two of the four safeguards likewise legitimates the settled principle that a citizen not in custody who is asked potentially incriminating questions by a police officer must claim the benefit of the Fifth Amendment instead of answering if he wishes to retain his privilege. *Miranda* v. *Arizona*, 384 U. S. 436, 477–478 (1966). Under such circumstances, not only does the citizen have a well-established right to refuse to answer, but also the environment is not such as to discourage or frustrate the assertion of his right. See *id.*, at 478.

that they be shown to have freely waived their rights after being fully apprised of them. *Id.*, at 475–479.[21]

B

If we remain sensitive to the concerns implicit in the foregoing pattern of cases, we should insist that the State, in the instant case, demonstrate that Murphy intelligently waived his right to remain silent. None of the four conditions that favor application of the principle that a defendant forfeits his privilege if he fails to claim it before confessing can be found in the circumstances under which Murphy was interrogated. First, the existence and scope of Murphy's constitutional right to refuse to testify were at best unclear when he appeared in the probation officer's office. It is undisputed that the conditions of Murphy's probation imposed on him a duty to answer all questions presented by his probation officer except those implicating his Fifth Amendment rights.[22] What exactly those rights were was far from apparent. The majority opinion in this case constitutes the first authoritative analysis of the privilege against self-incrimination available to a probationer. The ambiguity of scope of that privilege prior to today is suggested by the fact the Solicitor General, appearing for the United States as *amicus curiae*, seriously misconceived the rights that might have been asserted by Murphy when examined by his probation officer.[23] If, after being afforded substantial opportunity for research and reflection, the lawyers who represent the Nation err in their explication of the relevant constitutional principles, Murphy surely cannot be charged with knowledge of his entitlements.[24]

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[21] A less well-known situation involving a similar paucity of safeguards against inadvertent or uninformed abandonment of constitutional rights is that presented in *Smith* v. *United States*, 337 U. S. 137 (1949), and *Emspak* v. *United States*, 349 U. S. 190 (1955). In each case, the defendant was summoned to testify before an official body, appeared, and early in the proceeding invoked his privilege against self-incrimination. Questioning continued (in one case under a grant of immunity, in the other on unrelated topics). Later in the proceeding, the defendant was asked whether he wished to claim the privilege with regard to a specific substantive question. In each case, three factors reduced the defendant's ability, at that point, intelligently to exercise his constitutional rights and rendered the activities of his interrogators constitutionally suspect: the defendant's right to refuse to answer the question at issue was unclear; the environment in which the questions were presented was moderately coercive; and the nature of the proceeding as well as the defendant's prior assertion of his privilege against self-incrimination alerted the questioner to the likelihood that a truthful answer to the crucial question would expose the defendant to criminal liability. In both cases, the Court held that the defendant could be prosecuted on the basis of his answer to the decisive question only if the Government were able to demonstrate that he had made a sufficiently unequivocal and intelligent waiver of his Fifth Amendment rights to satisfy the standard enunciated in *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938) ("an intentional relinquishment or abandonment of a known right or privilege"). In both instances, the Court concluded that the Government had failed to make such a showing, and therefore reversed the defendant's conviction.

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[22] The majority construes Murphy's probation conditions to impose on him a general duty to respond to questions, but to contain an exemption for questions that impinged upon his Fifth Amendment rights. *Ante*, at 436–437. The State of Minnesota, in its brief in this case, adopts the same interpretation. See Brief for Petitioner 36–38 (arguing that probationers in Minnesota are obliged to answer all questions asked by their probation officers except those to which they may assert "valid" claims of privilege). Though I find that construction implausible, see Part I, *supra*, I assume it for present purposes. The point made here is simply that, at the time Murphy was interrogated, the scope of his Fifth Amendment rights—and therefore the scope of the hypothesized exemption from the general duty to answer—was ambiguous.

[23] The Solicitor General argued in the alternative that, "[w]hen a person has been convicted of a crime, his constitutional rights can be limited to the extent reasonably necessary to accommodate the government's penal and rehabilitative interests," and therefore that the government may constitutionally exert upon a probationer pressures to incriminate himself that it could not exert upon a citizen who had not been convicted of a crime. Brief for United States as *Amicus Curiae* 8; see *id.*, at 27–32. That proposition is rejected by the Court today.

[24] Cf. *Maness* v. *Meyers*, 419 U. S. 449, 466 (1975) ("A layman may not be aware of the precise scope, the nuances, and boundaries of his Fifth Amendment privilege").

Second, contrary to the suggestion of the majority, *ante*, at 432, Murphy was given no warning that he would be asked potentially incriminating questions. The letter in which Murphy's probation officer instructed him to make an appointment informed him that the purpose of the meeting was "[t]o further discuss a treatment plan for the remainder of [his] probation." App. to Pet. for Cert. C-36. In view of the fact that Murphy remained under a legal obligation to attend treatment sessions,[25] there was no reason why he should have assumed from the letter that the officer planned to question him regarding prior criminal activity.[26] In short, prior to the moment he was asked whether he had committed the murder, Murphy had no reason to suspect that he would be obliged to respond to incriminating questions. He thus had no opportunity to consult a lawyer, or even to consider how he should proceed.

Third, the environment in which the questioning occurred impaired Murphy's ability to recognize and claim his constitutional rights. It is true, as the majority points out, that the discussion between a probation officer and a probationer is likely to be less coercive and intimidating than a discussion between a police officer and a suspect in custody. *Ante*, at 433. But it is precisely in that fact that the danger lies. In contrast to the inherently adversarial relationship between a suspect and a policeman, the relationship between a probationer and the officer to whom he reports is likely to incorporate elements of confidentiality, even friendship. Indeed, many probation officers deliberately cultivate such bonds with their charges.[27] The point should not be overstated; undoubtedly, few probationers are entirely blind to the fact that their probation officers are "peace officer[s], . . . allied, to a greater or lesser extent, with [their] fellow peace officers." *Fare* v. *Michael C.*, 442 U. S. 707, 720 (1979). On the other hand, many probationers develop "relationship[s] of trust and cooperation" with their officers. *Id.*, at 722.[28] Through abuse of that trust, a probation officer can elicit admissions from a probationer that the probationer would be unlikely to make to a hostile police interrogator.

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[25] Contrary to the majority's suggestion, *ante*, at 432, nothing in the record indicates that the probation officer had "excused" Murphy from the condition of probation that required him "to pursue . . . Alpha treatment," App. to Pet. for Cert. C-35; the Minnesota Supreme Court found merely that she had agreed not to seek revocation of his probation because of his breach of that condition, see 324 N. W. 2d 340, 341 (1982).

[26] Indeed, for reasons discussed *infra*, at 460, it appears that the letter was shrewdly designed to *prevent* Murphy from discerning in advance the true purpose of the meeting.

The instant case aptly illustrates the danger. Before she sent her letter to Murphy asking him to make an appointment, the probation officer had decided to try to induce him to confess to the 1974 killing and to turn over that information to the police. She was aware that, if she were successful, Murphy would soon be arrested and tried for murder.[29] There was thus no prospect whatsoever that the information she elicited would be used to design a treatment program to be followed by Murphy during the remainder of his probation. Yet, in her letter, she described the purpose of the meeting as that of "discuss[ing] a treatment plan." When Murphy arrived at the meeting, she persisted in the deceit; instead of informing him at once what she intended to do with his anticipated confession to the 1974 murder, she told him that "her main concern was to talk to him about the relationship of the prior crime and the one of which he was convicted and about his need for treatment under the circumstances." 324 N. W. 2d 340, 341 (Minn. 1982). That Murphy succumbed to the deception is apparent from the sequence of his responses. Instead of denying responsibility for the 1974 killing, he admitted his guilt but sought to explain that extenuating circumstances accounted for that crime. Because those circumstances no longer existed, he argued, he had no need for further treatment. Only after Murphy had made his confession did the officer inform him of her intent to transmit that information to the police. In short, the environment in which the interview was conducted afforded the probation officer opportunities to reinforce and capitalize on Murphy's ignorance that he had a right to refuse to answer incriminating questions, and the officer deliberately and effectively exploited those opportunities.

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[27] See A. Smith & L. Berlin, Introduction to Probation and Parole 116–119 (1979); Mangrum, The Humanity of Probation Officers, 36 Fed. Probation 47 (June 1972); Note, Observations on the Administration of Parole, 79 Yale L. J. 698, 704–708 (1970); *People* v. *Parker*, 82 App. Div. 2d 661, 667, 442 N. Y. S. 2d 803, 807 (1981), aff'd, 57 N. Y. 2d 815, 441 N. E. 2d 1118 (1982).

[28] The relationship at issue in *Fare* was that between a probation officer and a juvenile probationer. But many of the Court's observations can be extended to the relationship between an officer and an adult probationer. See n. 27, *supra*.

[29] Indeed, when Murphy refused to turn himself in, it was his probation officer who secured the order for his arrest.

Finally, it is indisputable that the probation officer had reason to know that truthful responses to her questions would expose Murphy to criminal liability. This case does not arise out of a spontaneous confession to a routine question innocently asked by a government official. Rather, it originates in precisely the sort of situation the Fifth Amendment was designed to prevent—in which a government, instead of establishing a defendant's guilt through independent investigation, seeks to induce him, against his will, to convict himself out of his own mouth.

In sum, none of the factors that, in most contexts, justify application of the principle that a defendant loses his Fifth Amendment privilege unless he claims it in a timely fashion are present in this case. Accordingly, the State should be obliged to demonstrate that Murphy knew of his constitutional rights and freely waived them. Because the State has made no such showing, I would hold his confession inadmissible.

III

The criminal justice system contains safeguards that should minimize the damage done by the Court's decision today. In the future, responsible criminal defense attorneys whose clients are given probation will inform those clients, in their final interviews, that they may disregard probation conditions insofar as those conditions are inconsistent with probationers' Fifth Amendment rights. The attorneys will then carefully instruct their clients on the nuances of those rights as we have now explicated them.[30] Armed with this knowledge, few probationers will succumb to the sort of pressure and deceit that overwhelmed Murphy.

Because Murphy himself had the benefit of none of the safeguards just described, I would affirm the judgment of the Supreme Court of Minnesota that the admission into evidence of the disclosures he made to his probation officer violated the Constitution.

I respectfully dissent.

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[30] It is to be hoped, moreover, that persons currently on probation who are no longer represented by counsel will somehow be informed of the central principle established by the Court's decision: that a probationer has a right to refuse to respond to a question the answer to which might expose him to criminal liability unless he is granted immunity from the use of his answer against him in a subsequent criminal prosecution.

SOLEM, WARDEN, SOUTH DAKOTA STATE PENITENTIARY, ET AL. *v.* BARTLETT

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 82-1253. Argued December 7, 1983—Decided February 22, 1984

The Cheyenne River Act (Act), enacted in 1908, authorized the Secretary of the Interior "to sell and dispose of" for homesteading a specified portion of the Cheyenne River Sioux Reservation located in South Dakota, with the sale proceeds to be deposited in the United States Treasury to the credit of the Indians having tribal rights on the reservation. Respondent, a member of the Cheyenne River Sioux Tribe, was convicted of attempted rape in a South Dakota state court. After exhausting state remedies, he filed a habeas corpus petition in Federal District Court, contending that the crime occurred within Indian country, that although the Act opened a portion of the reservation for homesteading, it did not diminish the reservation, and that therefore the State lacked jurisdiction over him, the federal courts having exclusive jurisdiction under 18 U. S. C. § 1153. The District Court issued a writ of habeas corpus, and the Court of Appeals affirmed.

Held: The Act did not diminish the reservation. Pp. 466–481.

(a) Only Congress can divest an Indian reservation of its land and diminish its boundaries. But Congress must clearly evince an intent to change boundaries before diminishment will be found. When both a surplus land Act and its legislative history fail to provide substantial and compelling evidence of such an intent, this Court is bound by its traditional solicitude for Indian tribes to rule that diminishment did not take place and that old reservation boundaries survived the opening of unallotted land for non-Indian settlement. Pp. 466–472.

(b) Here, the Act's operative language authorizing the Secretary of the Interior to "sell and dispose" of certain lands, coupled with the creation of Indian accounts for the proceeds, suggests that the Secretary was simply being authorized to act as the Tribe's sales agent. The balance of the Act is consistent with the implication of the operative language that the Act opened but did not diminish the reservation. In fact, certain provisions of the Act strongly suggest that the unallotted opened lands would for the immediate future remain an integral part of the reservation. Isolated phrases in the Act supporting the view that the reservation was diminished, when balanced against the Act's stated and limited goal of opening up reservation lands for sale to non-Indian settlers, cannot carry the burden of establishing an express congressional purpose to diminish. Pp. 472–476.

(c) Nor do either the circumstances surrounding the passage of the Act or subsequent events establish a clear congressional purpose to diminish the reservation. Moreover, the opened portions of the reservation have retained their Indian character since 1908. Pp. 476–480.

691 F. 2d 420, affirmed.

MARSHALL, J., delivered the opinion for a unanimous Court.

Mark V. Meierhenry, Attorney General of South Dakota, *pro se*, argued the cause for petitioners. With him on the briefs was *Mark Smith*, Assistant Attorney General.

Tom D. Tobin argued the cause for the County of Dewey, South Dakota, et al. as *amici curiae* urging reversal. With him on the brief were *William W. Shakely* and *David Albert Mustone*.

Arlinda F. Locklear argued the cause for respondent. With her on the brief were *Terry L. Pechota* and *Richard B. Collins*.*

JUSTICE MARSHALL delivered the opinion of the Court.

On May 29, 1908, Congress authorized the Secretary of the Interior to open 1.6 million acres of the Cheyenne River Sioux Reservation for homesteading. Act of May 29, 1908, ch. 218, 35 Stat. 460 *et seq.* (Act or Cheyenne River Act). The question presented in this case is whether that Act of Congress diminished the boundaries of the Cheyenne River Sioux Reservation or simply permitted non-Indians to settle within existing reservation boundaries.

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*Briefs of *amici curiae* urging reversal were filed for the State of Minnesota by *Hubert H. Humphrey III*, Attorney General, and *James M. Schoessler*, Special Assistant Attorney General; and for the County of Duchesne, Utah, et al. by *Dennis L. Draney*, *Tom Slorby*, and *John Frederick*.

Briefs of *amici curiae* urging affirmance were filed for the United States by *Solicitor General Lee*, *Acting Assistant Attorney General Habicht*, *Deputy Solicitor General Claiborne*, and *David C. Shilton;* and for the Cheyenne River Sioux Tribe, South Dakota, et al., by *W. Richard West, Jr.*, *Arthur Lazarus, Jr.*, *Reid Peyton Chambers*, and *William R. Perry*.

I

In 1979, the State of South Dakota charged respondent John Bartlett, an enrolled member of the Cheyenne River Sioux Tribe, with attempted rape. Respondent pleaded guilty to the charge, and was sentenced to a 10-year term in the state penitentiary at Sioux Falls. After exhausting state remedies, respondent filed a *pro se* petition for a writ of habeas corpus in the United States District Court for the District of South Dakota. Respondent contended that the crime for which he had been convicted occurred within the Cheyenne River Sioux Reservation, established by Congress in the Act of Mar. 2, 1889, ch. 405, § 4, 25 Stat. 889; that, although on May 29, 1908, Congress opened for settlement by non-Indians the portion of the reservation on which respondent committed his crime, the opened portion nonetheless remained Indian country;[1] and that the State therefore lacked criminal jurisdiction over respondent.[2]

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[1] "Indian country" is defined in 18 U. S. C. § 1151 (1982 ed.) to mean "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same."

[2] Title 18 U. S. C. § 1153 provides: "Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, . . . assault with intent to commit rape . . . within the Indian country, shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States." Within Indian country, state jurisdiction is limited to crimes by non-Indians against non-Indians, see *New York ex rel. Ray* v. *Martin*, 326 U. S. 496 (1946), and victimless crimes by non-Indians. Tribes exercise concurrent jurisdiction over certain minor crimes by Indians, 18 U. S. C. §§ 1152, 1153, unless a State has assumed jurisdiction under § 1162.

Relying on previous decisions of the Eighth Circuit dealing with the Act of May 29, 1908,[3] the District Court accepted respondent's claim that the Act had not diminished the original Cheyenne River Sioux Reservation, and issued a writ of habeas corpus. On appeal, the Eighth Circuit, sitting en banc, affirmed, two judges dissenting. 691 F. 2d 420 (1982). Because the Supreme Court of South Dakota has issued a pair of opinions offering a conflicting interpretation of the Act of May 29, 1908,[4] we granted certiorari. 461 U. S. 956 (1983). We now affirm.

II

In the latter half of the 19th century, large sections of the Western States and Territories were set aside for Indian reservations. Towards the end of the century, however, Congress increasingly adhered to the view that the Indian tribes should abandon their nomadic lives on the communal reservations and settle into an agrarian economy on privately owned parcels of land.[5] This shift was fueled in part by the belief that individualized farming would speed the Indians' assimilation into American society and in part by the continuing demand for new lands for the waves of homesteaders moving west.[6] As a result of these combined pressures, Congress passed a series of surplus land Acts at the turn of the century to force Indians onto individual allotments carved out of reservations and to open up unallotted lands for non-Indian settlement. Initially, Congress legislated its Indian allotment program on a national scale,[7] but by the time of the Act of May 29, 1908, Congress was dealing with the surplus land question on a reservation-by-reservation basis, with each surplus land Act employing its own statutory language, the product of a unique set of tribal negotiation and legislative compromise.

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[3] *United States* v. *Dupris*, 612 F. 2d 319 (1979), vacated and remanded on other grounds, 446 U. S. 980 (1980); *United States* v. *Long Elk*, 565 F. 2d 1032 (1977); *United States ex rel. Condon* v. *Erickson*, 478 F. 2d 684 (1973).

[4] See *State* v. *Janis*, 317 N. W. 2d 133 (1982); *Stankey* v. *Waddell*, 256 N. W. 2d 117 (1977).

[5] An account of the movement and its effect on the Cheyenne River Sioux Tribe appears in F. Hoxie, Jurisdiction on the Cheyenne River Indian Reservation: An Analysis of the Causes and Consequences of the Act of May 29, 1908, pp. 1–30 (undated manuscript) (hereinafter Hoxie), which was prepared for presentation in *United States* v. *Dupris*, *supra*, and incorporated into the record of this case. See also Note, Jurisdictional Confusion on the Cheyenne River Indian Reservation: *United States* v. *Dupris*, 25 S. D. L. Rev. 355 (1980).

[6] See F. Cohen, Handbook of Federal Indian Law 127–134 (1982 ed.). The amount of surplus lands freed up by moving Indians onto individual

The modern legacy of the surplus land Acts has been a spate of jurisdictional disputes between state and federal officials as to which sovereign has authority over lands that were opened by the Acts and have since passed out of Indian ownership.[8] As a doctrinal matter, the States have jurisdiction over unallotted opened lands if the applicable surplus land Act freed that land of its reservation status and thereby diminished the reservation boundaries. On the other hand, federal, state, and tribal authorities share jurisdiction over these lands if the relevant surplus land Act did not diminish the existing Indian reservation because the entire opened area is Indian country under 18 U. S. C. § 1151(a) (1982 ed.). See nn. 1 and 2, *supra.*

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allotments was considerable. For instance, in 1908, the 2,620 members of the Cheyenne River Sioux Tribe had over 2.8 million acres of reservation land, or over 1,000 acres per tribal member. Under the allotment program, the average allotment per member was under 500 acres. See S. Rep. No. 439, 60th Cong., 1st Sess., pt. 1, p. 4 (1908); Hoxie 38, 40.

[7] See, *e. g.*, General Allotment Act of 1887, ch. 119, 24 Stat. 388 *et seq.*

[8] Regardless of whether the original reservation was diminished, federal and tribal courts have exclusive jurisdiction over those portions of the opened lands that were and have remained Indian allotments. See 18 U. S. C. § 1151(c) (1982 ed.). In addition, opened lands that have been restored to reservation status by subsequent Acts of Congress, see, *e. g.*, Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified at 25 U. S. C. § 461 *et seq.* (1982 ed.) (authorizing the return of opened lands to the original reservations)), fall within the exclusive criminal jurisdiction of federal and tribal courts under 18 U. S. C. §§ 1152, 1153.

Unfortunately, the surplus land Acts themselves seldom detail whether opened lands retained reservation status or were divested of all Indian interests. When the surplus land Acts were passed, the distinction seemed unimportant. The notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar at the turn of the century. Indian lands were judicially defined to include only those lands in which the Indians held some form of property interest: trust lands, individual allotments, and, to a more limited degree, opened lands that had not yet been claimed by non-Indians. See *Bates* v. *Clark*, 95 U. S. 204 (1877); *Ash Sheep Co.* v. *United States*, 252 U. S. 159 (1920). Only in 1948 did Congress uncouple reservation status from Indian ownership, and statutorily define Indian country to include lands held in fee by non-Indians within reservation boundaries. See Act of June 25, 1948, ch. 645, 62 Stat. 757 (codified at 18 U. S. C. § 1151 (1982 ed.)).

Another reason why Congress did not concern itself with the effect of surplus land Acts on reservation boundaries was the turn-of-the-century assumption that Indian reservations were a thing of the past. Consistent with prevailing wisdom, Members of Congress voting on the surplus land Acts believed to a man that within a short time—within a generation at most—the Indian tribes would enter traditional American society and the reservation system would cease to exist.[9] Given this expectation, Congress naturally failed to be meticulous in clarifying whether a particular piece of legislation formally sliced a certain parcel of land off one reservation.

Although the Congresses that passed the surplus land Acts anticipated the imminent demise of the reservation and, in fact, passed the Acts partially to facilitate the process, we have never been willing to extrapolate from this expectation a specific congressional purpose of diminishing reservations with the passage of every surplus land Act. Rather, it is settled law that some surplus land Acts diminished reservations, see, *e. g.*, *Rosebud Sioux Tribe* v. *Kneip*, 430 U. S. 584 (1977); *DeCoteau* v. *District County Court*, 420 U. S. 425 (1975), and other surplus land Acts did not, see, *e. g.*, *Mattz* v. *Arnett*, 412 U. S. 481 (1973); *Seymour* v. *Superintendent*, 368 U. S. 351 (1962). The effect of any given surplus land Act depends on the language of the Act and the circumstances underlying its passage.[10]

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[9] See *Montana* v. *United States*, 450 U. S. 544, 559–560, n. 9 (1981); Hoxie 1–20. Congress rejected the policy of allotment and surplus land sales in 1934. Indian Reorganization Act, 48 Stat. 984 *et seq.*

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[10] At one extreme, for example, the Act of Mar. 3, 1891, ch. 543, 26 Stat. 1035 *et seq.*, expressly stated that the Lake Traverse Indian Tribe agreed to "cede, sell, relinquish and convey" all interest in unallotted lands on the Lake Traverse Indian Reservation, and the Act further provided that the Tribe would receive full compensation in consideration for its loss. In *DeCoteau* v. *District County Court*, we found that the Lake Traverse Act, with its express language of cession, diminished the Lake Traverse Indian Reservation. At the other extreme, the Act of Mar. 22, 1906, ch. 1126, § 1, 34 Stat. 80, simply authorized the Secretary of the Interior "to sell or dispose of" unallotted lands on a portion of the Colville Indian Reservation; under the Act, the Colville Tribe received whatever proceeds these sales generated, rather than a sum certain. § 9, 34 Stat. 81. In *Seymour* v. *Superintendent*, 368 U. S., at 356, we held that, because the Colville Act lacked an unconditional divestiture of Indian interest in the lands, the Act simply opened a portion of the Colville Reservation to non-Indian settlers and did not diminish the reservation. See also *Mattz* v. *Arnett*, 412 U. S., at 497.

Between these extremes was the case of the Rosebud Sioux Reservation. In 1901, the Rosebud Sioux Tribe voted in favor of an agreement to cede a portion of their land in Gregory County to the United States in exchange for a sum certain. Three years later, Congress passed the Act of Apr. 23, 1904, ch. 1484, 33 Stat. 254–258, which incorporated the agreement's cession language, but replaced sum-certain payment with a provision guaranteeing the Tribe only the proceeds from the sale of the opened lands. Over the following years, Congress passed two more surplus land Acts involving Rosebud Reservation land in other counties; each of the subsequent Acts authorized the sale and disposal of additional lands and promised the tribes the proceeds of the sales. See Act of Mar. 2, 1907, ch. 2536, 34 Stat. 1230–1232; Act of May 30, 1910, ch. 260, 36 Stat. 448–452. Although none of the Rosebud Acts clearly severed the Tribe from its in-

Our precedents in the area have established a fairly clean analytical structure for distinguishing those surplus land Acts that diminished reservations from those Acts that simply offered non-Indians the opportunity to purchase land within established reservation boundaries. The first and governing principle is that only Congress can divest a reservation of its land and diminish its boundaries. Once a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise. See *United States* v. *Celestine*, 215 U. S. 278, 285 (1909).[11]

Diminishment, moreover, will not be lightly inferred. Our analysis of surplus land Acts requires that Congress clearly evince an "intent . . . to change . . . boundaries" before diminishment will be found. *Rosebud Sioux Tribe* v. *Kneip*, *supra*, at 615. The most probative evidence of congressional intent is the statutory language used to open the Indian lands. Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted opened lands. *DeCoteau* v. *District County Court*, *supra*, at 444–445; *Seymour* v. *Superintendent*, *supra*, at 355. When such language of cession is buttressed by an unconditional commitment from Congress to compensate the Indian tribe for its opened land, there is an almost insurmountable presumption that Congress meant for

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terest in the unallotted opened lands and even though the last two Acts were strikingly similar to the 1906 Act found not to have diminished the Colville Reservation in *Seymour* v. *Superintendent*, *supra*, this Court held that the circumstances surrounding the passage of the three Rosebud Acts unequivocally demonstrated that Congress meant for each Act to diminish the Rosebud Reservation. *Rosebud Sioux Tribe* v. *Kneip*.

[11] At one time, it was thought that Indian consent was needed to diminish a reservation, but in *Lone Wolf* v. *Hitchcock*, 187 U. S. 553 (1903), this Court decided that Congress could diminish reservations unilaterally.

the tribe's reservation to be diminished. See *DeCoteau* v. *District County Court, supra,* at 447–448.

As our opinion in *Rosebud Sioux Tribe* demonstrates, however, see n. 10, *supra*, explicit language of cession and unconditional compensation are not prerequisites for a finding of diminishment. When events surrounding the passage of a surplus land Act—particularly the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative Reports presented to Congress—unequivocally reveal a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation, we have been willing to infer that Congress shared the understanding that its action would diminish the reservation, notwithstanding the presence of statutory language that would otherwise suggest reservation boundaries remained unchanged. To a lesser extent, we have also looked to events that occurred after the passage of a surplus land Act to decipher Congress' intentions. Congress' own treatment of the affected areas, particularly in the years immediately following the opening, has some evidentiary value, as does the manner in which the Bureau of Indian Affairs and local judicial authorities dealt with unallotted open lands.

On a more pragmatic level, we have recognized that who actually moved onto opened reservation lands is also relevant to deciding whether a surplus land Act diminished a reservation. Where non-Indian settlers flooded into the opened portion of a reservation and the area has long since lost its Indian character, we have acknowledged that *de facto*, if not *de jure*, diminishment may have occurred. See *Rosebud Sioux Tribe* v. *Kneip, supra,* at 588, n. 3, and 604–605; *DeCoteau* v. *District County Court, supra,* at 428. In addition to the obvious practical advantages of acquiescing to *de facto* diminishment,[12] we look to the subsequent demographic history of opened lands as one additional clue as to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers.[13]

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[12] When an area is predominately populated by non-Indians with only a few surviving pockets of Indian allotments, finding that the land remains Indian country seriously burdens the administration of state and local

There are, of course, limits to how far we will go to decipher Congress' intention in any particular surplus land Act. When both an Act and its legislative history fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands, we are bound by our traditional solicitude for the Indian tribes to rule that diminishment did not take place and that the old reservation boundaries survived the opening. *Mattz* v. *Arnett*, 412 U. S., at 505; *Seymour* v. *Superintendent*, 368 U. S. 351 (1962).

III

A

We now turn to apply these principles to the Act of May 29, 1908. We begin with the Act's operative language, which reads:

> "[T]he Secretary of the Interior . . . is hereby . . . authorized and directed, as hereinafter provided, to sell and dispose of all that portion of the Cheyenne River and Standing Rock[[14]] Indian reservations in the States of

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governments. See *Rosebud Sioux Tribe* v. *Kneip; DeCoteau* v. *District County Court.* Conversely, problems of an imbalanced checkerboard jurisdiction arise if a largely Indian opened area is found to be outside Indian country. See *Seymour* v. *Superintendent*, 368 U. S., at 358.

[13] Resort to subsequent demographic history is, of course, an unorthodox and potentially unreliable method of statutory interpretation. However, in the area of surplus land Acts, where various factors kept Congress from focusing on the diminishment issue, see *supra*, at 468, the technique is a necessary expedient.

[14] As this language reveals, the Act dealt with land on two bordering Sioux reservations. Although for purposes of this case we are only concerned with the Act's effect on the Cheyenne River Reservation, nothing in the record leads us to suspect that Congress intended the Act to have a different effect on the Standing Rock Reservation.

> South Dakota and North Dakota lying and being within the following described boundaries . . . .
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> . . . . .
>
> "[F]rom the proceeds arising from the sale and disposition of the lands aforesaid, exclusive of the customary fees and commissions, there shall be deposited in the Treasury of the United States, to the credit of the Indians belonging and having tribal rights on the reservation aforesaid in the States of South Dakota and North Dakota the sums to which the respective tribes may be entitled . . . ." Ch. 218, §§1, 6, 35 Stat. 460–461, 463.

These provisions stand in sharp contrast to the explicit language of cession employed in the Lake Traverse and 1904 Rosebud Acts discussed in our opinions in *DeCoteau* and *Rosebud Sioux Tribe.* See n. 10, *supra.* Rather than reciting an Indian agreement to "cede, sell, relinquish and convey" the opened lands, the Cheyenne River Act simply authorizes the Secretary to "sell and dispose" of certain lands. This reference to the sale of Indian lands, coupled with the creation of Indian accounts for proceeds, suggests that the Secretary of the Interior was simply being authorized to act as the Tribe's sales agent. Indeed, when faced with precisely the same language in *Seymour* v. *Superintendent, supra,* at 356, we concluded that such provisions "did no more than to open the way for non-Indian settlers to own land on the reservation in a manner which the Federal Government, acting as guardian and trustee for the Indians, regarded as beneficial to the development of its wards."[15]

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[15] As petitioners stress, the operative language of the Cheyenne River Act is also similar to language in the 1907 and 1910 Rosebud Acts, which this Court held diminished the Rosebud Sioux Reservation. Our analysis of Rosebud Acts, however, was strongly colored by the existence of a 1904 Rosebud Act containing cession language "precisely suited" to disestablishment, and the admission of the Indians that the second two Rosebud Acts must have diminished their reservation if the previous Act did. *Rosebud Sioux Tribe* v. *Kneip,* 430 U. S., at 597, 606, and n. 29; see n. 10, *supra.*

The balance of the Cheyenne River Act is largely consistent with the implication of the operative language that the Act opened but did not diminish the Cheyenne River Sioux Reservation. Nowhere else in the Act is there specific reference to the cession of Indian interests in the opened lands or any change in existing reservation boundaries. In fact, certain provisions of the Act strongly suggest that the unallotted opened lands would for the immediate future remain an integral part of the Cheyenne River Reservation. In § 1 of the Act, the Secretary was authorized to set aside portions of the opened lands "for agency, school, and religious purposes, to remain reserved as long as needed, and as long as agency, school, or religious institutions are maintained thereon for the benefit of said Indians." 35 Stat. 461. It is difficult to imagine why Congress would have reserved lands for such purposes if it did not anticipate that the opened area would remain part of the reservation. This interpretation is supported by § 2 of the Act, under which Cheyenne River Indians were given permission to continue to obtain individual allotments on the affected portion of the reservation before the land was officially opened to non-Indian settlers. *Id.*, at 462–463. Also in § 2, Congress instructed the Geological Survey to examine the opened area for "lands bearing coal" and exempted those sections from allotment or disposal, the apparent purpose being to reserve those mineral resources for the whole Tribe. *Id.*, at 462; see S. Rep. No. 439, 60th Cong., 1st Sess., pt. 1, p. 6 (1908).

This case is made more difficult, however, by the presence of some language in the Cheyenne River Act that indirectly supports petitioners' view that the reservation was diminished. For instance, in a provision permitting Indians already holding an allotment on the opened lands to obtain new allotments in the unopened territories, the Act refers to the unopened territories as "within the respective reservations thus diminished." § 2, 35 Stat. 461. Elsewhere, the Act permits tribal members to harvest timber on certain parts of the opened lands, but conditions the grant for "only as long as the lands remain part of the public domain." § 9, 35 Stat. 464. On the assumption that Congress would refer to opened lands as being part of the public domain only if the lands had lost all vestiges of reservation status, petitioners and several *amici* point to the term "public domain" as well as the phrase "reservations thus diminished" as evidence that Congress understood the Cheyenne River Act to divest unallotted open lands of their reservation status.[16]

Undisputedly, the references to the opened areas as being in "the public domain" and the unopened areas as constituting "the reservation thus diminished" support petitioners' view that the Cheyenne River Act diminished the reservation. These isolated phrases, however, are hardly dispositive.[17] And, when balanced against the Cheyenne River Act's stated and limited goal of opening up reservation lands for sale to non-Indian settlers, these two phrases cannot carry the burden of establishing an express congressional purpose to diminish. Cf. *Mattz* v. *Arnett*, 412 U. S., at 497–499.[18] The

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[16] See Brief for Petitioners 19–24; Brief for Counties of Dewey et al. as *Amici Curiae* 12–14; Brief for Counties of Duchesne et al. as *Amici Curiae* 39–45.

[17] There is also considerable doubt as to what Congress meant in using these phrases. In 1908, "diminished" was not yet a term of art in Indian law. When Congress spoke of the "reservation thus diminished," it may well have been referring to diminishment in common lands and not diminishment of reservation boundaries. See *United States el rel. Condon* v. *Erickson*, 478 F. 2d, at 687. Similarly, even without diminishment, unallotted opened lands could be conceived of as being in the "public domain" inasmuch as they were available for settlement.

[18] Both the South Dakota Supreme Court and dissenting judges from the Eighth Circuit have found further support for diminishment in the so-called school lands provision and a subsequently enacted liquor prohibition for the opened lands. *Stankey* v. *Waddell*, 256 N. W. 2d, at 121, 126; *United States* v. *Dupris*, 612 F. 2d, at 334; see Act of May 29, 1908, ch. 218, § 7, 35 Stat. 463 (school land provision); Act of Feb. 17, 1910, ch. 40, 36 Stat. 196–197 (liquor prohibition Act). Although we credited similar provisions as supportive of our holding in *Rosebud Sioux Tribe* v. *Kneip*,

Act of May 29, 1908, read as a whole, does not present an explicit expression of congressional intent to diminish the Cheyenne River Sioux Reservation.[19]

B

The circumstances surrounding the passage of the Cheyenne River Act also fail to establish a clear congressional purpose to diminish the reservation. In contrast to the Lake Traverse Act and 1904 Rosebud Act, the Cheyenne River Act did not begin with an agreement between the United States and the Indian Tribes, in which the Indians agreed to cede a portion of their territory to the Federal Government.[20] The Cheyenne River Act had its origins in "[a] bill to authorize the sale and disposition of a portion of the surplus and unallotted lands in the Cheyenne River and Standing Rock Indian reservations," introduced by Senator Gamble of South Dakota on December 9, 1907. S. 1385, 60th Cong., 1st Sess. (1907). Once the bill was under consideration, the Secretary of the Interior dispatched an Inspector McLaughlin to the two affected reservations to consult with the Tribes about the bills.

During his meeting with members of the Cheyenne River Tribe, Inspector McLaughlin admittedly spoke in terms of cession and the relinquishment of Indian interests in the opened territories. However, it is impossible to say that

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supra, at 605–615, inferences from these provisions were obviously of secondary importance to our decision, see nn. 10 and 15, *supra*. Moreover, as independent evidence of a congressional intention to diminish, such evidence is suspect. See Brief for United States as *Amicus Curiae* 14, n. 14, 16, n. 16; see also 430 U. S., at 623, n. 12 (MARSHALL, J., dissenting).

[19] Read as authorizing the Secretary to serve as the Tribe's sales agent, the Act fulfills Congress' original plan that the surplus lands of the Cheyenne River Sioux Reservation could be sold off once members of the Tribe moved onto allotment lands. See Act of Mar. 2, 1889, ch. 405, § 12, 25 Stat. 892.

[20] See *Rosebud Sioux Tribe* v. *Kneip*, 430 U. S., at 589–598; *DeCoteau* v. *District County Court*, 420 U. S., at 436–444.

the Tribe agreed to the terms that McLaughlin presented. Due to bad weather during McLaughlin's visit, only 63 members of the Tribe attended his meeting. At the close of McLaughlin's presentation, the president of the Cheyenne River Business Council said that he would have to discuss the matter with the entire Tribe before he could respond to the proposed bill. McLaughlin agreed to delay submission of his report to Congress until he had received word from the Tribe, but, when the Tribe's vote had not reached Washington 14 days later, McLaughlin sent his report to Congress with the conclusion: "The general sentiment of the Indians in council with me at the agency was in favor of the relinquishment [of the opened lands]." H. R. Rep. No. 1539, 60th Cong., 1st Sess., 7 (1908); see *id.*, at 23–24, 28. McLaughlin, however, also informed Congress of the low attendance at his meeting with the Cheyenne River Tribe and acknowledged that he had never received formal approval from the Tribe. *Id.*, at 8.

With a full report of Inspector McLaughlin's meeting with the Cheyenne River Tribe before it, Congress considered the Cheyenne River Act in April and May 1908. In neither floor debates nor legislative Reports is there a clear statement that Congress interpreted Inspector McLaughlin's report to establish an agreement on the part of the Cheyenne River Indians to cede the opened areas.[21] Indeed, the most explicit statement of Congress' view of the Indian's position was: "The Indians upon both reservations are satisfied to have the surplus and unallotted lands disposed of under the provisions of the bill as amended." S. Rep. No. 439, 60th Cong., 1st Sess., pt. 1, p. 4 (1908), quoted and adopted in H. R. Rep. No. 1539, 60th Cong., 1st Sess., 3 (1908). For the most part, the legislative debate of the Cheyenne River Act centered on how much money the Indians would be paid for certain sections of the opened area that the United States was going to buy for school lands, and no mention was made of the Act's effect on the reservation's boundaries or whether state or federal officials would have jurisdiction over the opened areas. See 42 Cong. Rec. 4753–4755 (1908) (Senate debate); *id.*, at 7003–7007 (House debate).

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[21] One reason why Congress may not have interpreted the McLaughlin report as evidence of tribal agreement to cede the land is that a delegation from the Tribe followed McLaughlin back to Washington to urge Congress not to pass the proposed legislation. See Hoxie 55–56. The particulars of the delegation's trip are not known.

To be sure, there are a few phrases scattered through the legislative history of the Cheyenne River Act that support petitioners' position. Both the Senate and House Reports refer to the "reduced reservation" and state that "lands reserved for the use of the Indians upon both reservations as diminished . . . are ample . . . for the present and future needs of the Indians of the respective tribes." S. Rep. No. 439, *supra*, pt. 1, at 4, quoted and adopted in H. R. Rep. No. 1539, *supra*, at 3. However, it is unclear whether Congress was alluding to the reduction in Indian-owned lands that would occur once some of the opened lands were sold to settlers or to the reduction that a complete cession of tribal interests in the opened area would precipitate. See also n. 17, *supra*. Without evidence that Congress understood itself to be entering into an agreement under which the Tribe committed itself to cede and relinquish all interests in unallotted opened lands, and in the absence of some clear statement of congressional intent to alter reservation boundaries, it is impossible to infer from a few isolated and ambiguous phrases a congressional purpose to diminish the Cheyenne River Sioux Reservation.

C

The subsequent treatment of the Cheyenne River Sioux Reservation by Congress, courts, and the Executive is so rife with contradictions and inconsistencies as to be of no help to either side. For instance, two years after the Cheyenne River Act, Congress passed a bill to sell a portion of the opened lands and called the area "surplus and unallotted lands *in the Cheyenne River Indian Reservation*," suggesting that the opened area was still part of the reservation. Act of June 23, 1910, ch. 369, 36 Stat. 602 (emphasis added). But, 12 years after that, Congress passed another piece of legislation referring to the opened lands as "the former" Cheyenne River Sioux Reservation and suggesting that the reservation had been diminished. See Act of Apr. 25, 1922, ch. 140, 42 Stat. 499. Ample additional examples pointing in both directions leave one with the distinct impression that subsequent Congresses had no clear view whether the opened territories were or were not still part of the Cheyenne River Reservation. A similar state of confusion characterizes the Executive's treatment of the Cheyenne River Sioux Reservation's opened lands.[22] Moreover, both parties have been able to cite instances in which state and federal courts exerted criminal jurisdiction over the disputed area in the years following opening.[23] Neither sovereign dominated the jurisdictional history of the opened lands in the decades immediately following 1908.

What is clear, however, is what happened to the Cheyenne River Sioux Tribe after the Act of May 29, 1908, was passed.

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[22] An exhaustive list of administrative documents supporting petitioners' position is collected in App. B to Brief for Counties of Dewey et al., as *Amici Curiae* in No. 82-1582 (CA8). Additional administrative documents supporting respondent's position can be found in Hoxie 87–92.

[23] According to one study, federal, tribal, and state courts shared jurisdiction over the opened areas in the decades following opening. Hoxie 100–128. Between 1910 and 1920, only two Indians were tried in state court for crimes committed on the opened lands. *Id.*, at 128. During this period, the federal authorities were primarily responsible for Indian life on both opened and unopened portions of the reservation. In later years, however, the state courts came to assume that the opened areas fell within their general criminal jurisdiction. See, *e. g.*, *State* v. *Barnes*, 81 S. D. 511, 137 N. W. 2d 683 (1965). It was only in 1973 that the Eighth Circuit challenged this assumption in *United States ex rel. Condon* v. *Erickson*, 478 F. 2d 684.

Most of the members of the Tribe obtained individual allotments on the lands opened by the Act.[24] Because most of the Tribe lived on the opened territories, tribal authorities and Bureau of Indian Affairs personnel took primary responsibility for policing and supplying social services to the opened lands during the years following 1908.[25] The strong tribal presence in the opened area has continued until the present day. Now roughly two-thirds of the Tribe's enrolled members live in the opened area. The seat of tribal government is now located in a town in the opened area, where most important tribal activities take place.

Also clear is the historical fact that the opening of the Cheyenne River Sioux Reservation was a failure. Few homesteaders perfected claims on the lands, due perhaps in part to the price of the land but probably more importantly to the fact that the opened area was much less fertile than the lands in southern South Dakota opened by other surplus land Acts.[26] As a result of the small number of homesteaders who settled on the opened lands and the high percentage of tribal members who continue to live in the area, the population of the disputed area is now evenly divided between Indian and non-Indian residents. Under these circumstances, it is impossible to say that the opened areas of the Cheyenne River Sioux Reservation have lost their Indian character.

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[24] Hoxie 38 (55% of allotments were on opened lands).

[25] *Id.*, at 64–95. Dr. Hoxie concluded: "Unentered lands were considered a part of the reservation. They were available for allotment to tribal members, they were leased for the benefit of the tribe, and they were specifically defined as different from land in the public domain." *Id.*, at 87.

[26] During a debate on subsequent surplus land, Congressman Burke, a sponsor of the Cheyenne River Act, reported: "At the opening of the Cheyenne and the Standing Rock Reservations . . . there were not sufficient people to begin to take anywhere near the land that was to be disposed of, and the reason they did not take it was the price of the land, which was undoubtedly too high." 49 Cong. Rec. 1106 (1913). According to the Government's estimates, only half of the opened lands ever passed out of Indian ownership. Brief for United States as *Amicus Curiae* 26–27, n. 31.

IV

Neither the Act of May 29, 1908, the circumstances surrounding its passage, nor subsequent events clearly establish that the Act diminished the Cheyenne River Sioux Reservation. The presumption that Congress did not intend to diminish the reservation therefore stands, and the judgment of the Eighth Circuit is

Affirmed.

DIXSON *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 82–5279. Argued October 12, 1983—Decided February 22, 1984*

The city of Peoria received federal block grants from the Department of Housing and Urban Development under the Housing and Community Development Act of 1974 (HCDA), which provides for such grants for urban renewal programs. As authorized by the HCDA, the city designated a community-based, social service corporation to be the city's subgrantee in charge of the administration of the federal grants. Petitioners, officers responsible for the expenditure of the federal funds and administration of the corporation's urban renewal programs, were indicted for violating the federal bribery statute, 18 U. S. C. § 201, by using their positions to extract kickbacks from contractors seeking to work on housing rehabilitation projects. Before trial, the Federal District Court denied petitioners' motions to dismiss the indictment on the asserted ground that they were not "public officials" under 18 U. S. C. § 201(a), which defines the term "public official" as including "an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, . . . in any official function, under or by authority of any such department, agency, or branch of Government." Petitioners were convicted, and the Court of Appeals affirmed.

Held: Petitioners are "public officials" within the meaning of § 201(a) and thus are subject to prosecution under the bribery statute. Pp. 489–501.

(a) There is no merit in petitioners' contention that they cannot be considered to be persons "acting for or on behalf of the United States" under the statutory definition because neither they nor their employer ever entered into any direct agreement with the Federal Government. Although the language of § 201(a) does not decide the dispute, its legislative history—including Congress' longstanding commitment to a broadly drafted federal bribery statute, its desire to continue that tradition when it adopted the language of § 201(a) in the 1962 revisions of the federal conflicts of interest and bribery statutes, and its awareness of the federal judiciary's interpretation of the identical phrase in earlier federal bribery statutes to have a broad jurisdictional reach (particularly the Second Cir-

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*Together with No. 82–5331, *Hinton* v. *United States*, also on certiorari to the same court.

cuit's decision in *United States* v. *Levine*, 129 F. 2d 745)—establishes that Congress never intended § 201(a)'s open-ended definition of "public official" to be restricted to persons in a formal employment or agency relationship with the Government. The proper inquiry is whether the person occupies a position of public trust with official federal responsibilities. Pp. 489–496.

(b) Given the structure of the HCDA program and petitioners' responsible positions as administrators of the subgrant, they served as public officials for purposes of § 201(a). In allocating the federal resources made available to the city through the HCDA grant program, petitioners were charged with abiding by federal guidelines, which dictated both where and how the federal funds could be distributed. By accepting the responsibility for distributing the federal resources, petitioners assumed the quintessentially official role of administering a social service program established by Congress. Pp. 496–498.

(c) The majority of recent decisions in lower federal courts supports the conclusion that employment by the United States or some other similarly formal contractual or agency bond is not a prerequisite to prosecution under the federal bribery statute. Pp. 498–499.

(d) The holding here does not mean that the mere presence of some federal assistance brings a local organization and its employees within the jurisdiction of the federal bribery statute, or that all employees of local organizations responsible for administering federal grant programs are public officials within the meaning of § 201(a). To be a public official under the statute, an individual must possess some degree of official responsibility for carrying out a federal program or policy. Pp. 499–501.

683 F. 2d 195, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and POWELL, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which BRENNAN, REHNQUIST, and STEVENS, JJ., joined, *post*, p. 501.

Donald V. Morano, by appointment of the Court, 459 U. S. 1168, argued the cause for petitioners. With him on the briefs were *Michael P. Seng* and *Edward Burke Arnolds*. *Richard D. Trainor*, *Robert D. Quinlivan, Jr.*, and *Ronald F. Neville* filed a brief for petitioner in No. 82–5331.

Richard G. Wilkins argued the cause for the United States. With him on the brief were *Solicitor General Lee*, *Assistant Attorney General Jensen*, and *Deputy Solicitor General Bator*.

JUSTICE MARSHALL delivered the opinion of the Court.

These consolidated cases present the question whether officers of a private, nonprofit corporation administering and expending federal community development block grants are "public officials" for purposes of the federal bribery statute. 18 U. S. C. § 201(a).

I

In 1979, the city of Peoria received two federal block grants from the Department of Housing and Urban Development (HUD). The first was a $400,000 Community Development Block Grant; the second a $638,000 Metro Reallocation Grant. Both grants were funded through the Housing and Community Development Act of 1974 (HCDA), 88 Stat. 633, as amended, 42 U. S. C. §§ 5301–5320 (1976 ed. and Supp. V). Under that Act, the Secretary of HUD is authorized to dispense federal block grants to state and local governments and nonprofit community organizations for urban renewal programs such as the rehabilitation of residential structures, code enforcement in deteriorating areas, and the construction of public works projects.

The city of Peoria subsequently designated United Neighborhoods, Inc. (UNI), a community-based, social-service organization, to be the city's subgrantee in charge of the administration of the federal block grant funds.[1] UNI in turn hired petitioner Dixson to serve as the corporation's Executive Director and petitioner Hinton as its Housing Rehabilitation Coordinator. Petitioner Dixson was responsible for the general supervision of UNI's programs, including fiscal control and execution of contracts. Petitioner Hinton's duties included contracting with persons applying for housing rehabilitation assistance, and contracting with demolition firms.

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[1] Local recipients of HCDA block grants have the option of distributing the funds directly or of subcontracting the administration of the funds to private, nonprofit organizations. 42 U. S. C. §§ 5302(a)(1), (c) (1976 ed. and Supp. V); 24 CFR § 570.204 (1983).

A federal grand jury named petitioners in an 11-count indictment filed on March 12, 1981. The indictment charged that petitioners, as "public officials" under 18 U. S. C. § 201(a), had sought a series of bribes in return for "being influenced in their performance of an official act in respect to the awarding of housing rehabilitation contracts" in violation of 18 U. S. C. §§ 201(c)(1),(2).

According to the Government's evidence at trial, petitioners used their positions to extract $42,694 in kickbacks from contractors seeking to work on UNI's housing rehabilitation projects. One contractor testified how he was approached by petitioner Hinton and persuaded to pay petitioners 10 percent of each housing rehabilitation contract that petitioners awarded him. The contractor explained that on 10 occasions, he received first draw checks from UNI for 20 percent of the contract price, deposited the check at his bank, and paid half the amount of the check in cash to petitioners. A second contractor testified as to substantially the same arrangement.

Before trial, petitioners moved to dismiss the indictment on the grounds that they were not "public officials" within the meaning of the federal statute. Their motions were denied, and following a jury trial in the United States District Court for the Central District of Illinois, petitioners were convicted as charged. The District Court sentenced each to 7½ years' imprisonment, to be followed by 3 years' probation. Petitioners appealed to the United States Court of Appeals for the Seventh Circuit, which affirmed. 683 F. 2d 195 (1982). Both petitioners filed petitions for writs of certiorari, and we granted the writs. 459 U. S. 1085 (1982). We now affirm.

II

Petitioners' sole claim is that they were not "public officials" within the meaning of 18 U. S. C. § 201(a) and therefore not subject to prosecution under the federal bribery statute.[2] Since our disposition of this claim turns on the relationship between petitioners and the Federal Government, we begin our discussion with an analysis of the HCDA block grant program and petitioners' role in administering that program.

Congress passed the HCDA to meet the social, economic, and environmental problems facing cities. 42 U. S. C. § 5301(a) (1976 ed. and Supp. V). The primary objective of the Act is "the development of viable urban communities." § 5301(c). While the HCDA addressed a national problem, Congress enacted the legislation as a federal block grant statute, under which the day-to-day administration of the federal program, including the actual expenditure of federal funds, is delegated to state and local authorities.

The HCDA creates a "consistent system of Federal aid," § 5301(d), by distributing funds committed by Congress through organizations outside the Federal Government, while retaining federal control to assure compliance with statutory federal objectives and implementing regulations. Congress itself specified the 17 categories of community projects upon which HCDA grants can be spent. § 5305. Within the federal constraints, grant recipients design programs addressing local needs. To obtain federal funds, local communities must submit to the Secretary a plan made in accordance with national urban growth policies, and supplement the plan with annual performance reports. §§ 5304(a), (d). The Federal Government retains the right to audit the records of HCDA programs, § 5304(e), and to recover improperly expended funds. § 5311(b)(2).

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[2] Title 18 U. S. C. § 201 reads in pertinent part:

"(a) For the purpose of this section: 'public official' means Member of Congress, the Delegate from the District of Columbia, or Resident Commissioner, either before or after he has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror;

. . . . .

"(c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

"(1) being influenced in his performance of any official act; or

"(2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud on the United States; . . .

. . . . .

"Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States."

HCDA grantees give assurances to HUD that they, and their subgrantees, will abide by specific financial accountability, equal opportunity, fair labor, environmental, and other requirements. §§ 5304, 5309, 5310; 24 CFR § 570.307 (1983). By administering HCDA funds, private nonprofit organizations subject themselves to numerous federal restrictions beyond those imposed directly by HUD. Like other recipients of federal grant funds, HUD grantees and subgrantees are subject to a uniform audit procedure, adopted by the Federal Government as "an integral element" of "full accountability by those entrusted with the responsibility for administering the programs."[3]

UNI voluntarily assumed the status of an HCDA subgrantee when UNI and the city of Peoria signed five separate grant agreements in March and October 1979, pursuant to which UNI hired petitioners. Under the first four of these agreements, the city promised to provide UNI with $492,500, and UNI committed itself to spend these funds on urban renewal projects and related administrative costs, such as salaries and fringe benefits for UNI employees. The agreements specifically allocated funds to petitioners' salaries: $16,000 of the city grants was for UNI's Executive Director and $15,500 was for a Rehabilitation Coordinator.

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[3] Guidelines for Financial and Compliance Audits of Federally Assisted Programs, reprinted at 45 Fed. Reg. 21837, 21838 (1980). The Guidelines explain the uniform audit procedure, and are distributed as Attachment P to OMB Circular A-102 (1980), Uniform Requirements for Assistance to State and Local Governments. See also OMB Circular A-110 (1976). Attachment O, which contains a Code of Conduct for administering federal funds, including a specific requirement that "the [grantee's] officers, employees or agents shall neither solicit nor accept . . . anything of monetary value from contractors or potential contractors [or parties to subagreements]."

In a fifth agreement, Peoria promised UNI another $669,200 to be used "solely for a program operated by UNI which provides loans and grants to the rehabilitation of residential housing units in the designated Metropolitan Reallocation Grant Area." One anomaly in the five Peoria-UNI contracts is that, beyond this reference to the "Metropolitan Reallocation Grant Area" and to "312 loans,"[4] none of these first contracts explicitly refers to the federal Act or to UNI's new status of subgrantee.[5] UNI's application to participate in the federally funded program, however, unequivocally shows UNI's awareness of the Federal Government's relationship to, and interest in, the grant agreements. UNI's proposal to Peoria stated: "[W]e wish to undertake a joint effort with the City of Peoria to achieve the common goals as set forth in *the Housing and Community Develop-*

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[4] One of Peoria's HCDA grants was a Metro Reallocation Grant. 42 U. S. C. § 5306(c) (1976 ed. and Supp. V). HUD rehabilitation loans to owners and tenants in urban renewal areas are called "312 loans." Pub. L. 88–560, § 312, 78 Stat. 790, codified at 42 U. S. C. § 1452b (1976 ed. and Supp. V). The Secretary of HUD is authorized by statute "to delegate to or use as his agent any Federal or local public or private agency or organization . . . to carry out the objectives of [the loan program]." § 1452b(f).

[5] When UNI and Peoria renewed their agreement for the following fiscal year, a few days after the period named in the indictment, they amended the first series of contracts to warrant in explicit terms that UNI would comply with HUD Community Development Block Grants regulations, 24 CFR pt. 570 (1983). Record, Govt. Exh. 25.

ment Act to insure safe, sanitary and decent housing for all people." Record, Govt. Exh. 19. (Emphasis added.)

Moreover, there is no suggestion in the record that petitioners and other UNI executives failed to understand that they were involved in a federal program. As described above, the task of distributing HCDA funds is governed in numerous respects by federal statutes and regulations. Knowledge of the existence and applicability of these federal requirements and guidelines is presumed as a matter of law.[6] As a matter of fact, the federal interest in protecting the integrity of its block grant funds undoubtedly was driven home to petitioners when, in early 1980, in the midst of the period covered by the Government's indictment, Arthur Andersen & Co. conducted an audit of UNI's records in accordance with HUD's Audit Guide and Standards for Community Development Block Grant Recipients.

Petitioners' responsibilities included receiving applications for housing assistance and soliciting contractor bids for qualified rehabilitation proposals. According to UNI's organizational structure, petitioners were supposed to submit the bids on qualified proposals to UNI's Housing Committee for final approval, but, in fact, the Committee's review was a "mere formality."[7] As a practical matter, petitioners alone decided which property owners and contractors in the city of Peoria would be the beneficiaries of the federal funds made available to the city through the HCDA block grant program.

III

Petitioners contend now, as they have throughout this litigation, that, as executives of a private nonprofit corporation unaffiliated with the Federal Government, they were never

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[6] 44 U. S. C. § 1507. The appearance of rules and regulations in the Federal Register gives legal notice of their contents.

[7] Of the 10 contracts awarded to one of the contractors who testified on behalf of the Government at trial, UNI's Housing Committee approved only one. Petitioner Hinton signed the remaining nine.

"public officials" as Congress defined that term. 18 U. S. C. § 201(a).

Under § 201(a), the term "public official" includes "an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, . . . in any official function, under or by authority of any such department, agency, or branch of Government." There being no basis for claiming that petitioners were officers or employees of the United States, the Government's sole contention is that petitioners acted "for or on behalf of" the United States "in an official function" under the authority of HUD.

Petitioners argue that they cannot be considered to have acted "for or on behalf of the United States" because neither they nor their employer UNI ever entered into any agreement with the United States or any subdivision of the Federal Government. In advancing this position, petitioners rely primarily on two Second Circuit decisions holding that a New York City employee involved in the administration of the federal Model Cities Program was not a public official under § 201. *United States* v. *Loschiavo*, 531 F. 2d 659 (1976); *United States* v. *Del Toro*, 513 F. 2d 656, cert. denied, 423 U. S. 826 (1975). Petitioners and these Second Circuit decisions rest on the premise that an individual does not work "for or on behalf of the United States . . . in any official function" without some formal bond with the United States, such as an agency relationship, an employment contract, or a direct contractual obligation.

The Government, in response, argues that the term "public official" has a broader sweep, covering not only parties in privity with the United States, but also any private individuals responsible for administering federally funded and federally supervised programs. The Government defends the decision of the Seventh Circuit in the instant cases which held that the "substantial federal supervision over the cities and all sub-grantees responsible for local distribution of grant funds" made petitioners' public officials for purposes of § 201.

683 F. 2d, at 197–198. The court reasoned that petitioners "were acting as federal agents in the sense of having discretion in administering the expenditure of federal funds." *Id.*, at 199.

As is often the case in matters of statutory interpretation, the language of § 201(a) does not decide the dispute. The words can be interpreted to support either petitioners' or the Government's reading. We must turn, therefore, to the legislative history of the federal bribery statute to determine whether these materials clarify which of the proposed readings is consistent with Congress' intent. If the legislative history fails to clarify the statutory language, our rule of lenity would compel us to construe the statute in favor of petitioners, as criminal defendants in these cases. See *Rewis* v. *United States*, 401 U. S. 808, 812 (1971).

A

Congress passed the current federal bribery provisions, including § 201(a), in 1962, as part of an effort to reformulate and rationalize all federal criminal statutes dealing with the integrity of government. At the time of the 1962 revisions, general federal bribery statutes had been in existence for more than a century. From the start, Congress drafted its bribery statutes with broad jurisdictional language,[8] and periodically amended the provisions to ensure that the scope of federal criminal liability kept pace with the growth and diversification of the Federal Government.[9] Prior to 1962, in recognition of Congress' apparent desire for the federal bribery statutes to have wide application, the federal judiciary interpreted the statutes and, indeed, the phrase "person acting for or on behalf of the United States" to have a broad jurisdictional reach.[10]

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[8] Congress passed the first federal bribery statute of general application in 1853. See Act of Feb. 26, 1853, ch. 81, § 6, 10 Stat. 171. As its name—"An Act to Prevent Frauds upon the Treasury"—implies, the Act sought to prevent the misuse of federal funds by any person charged with a public trust. See Cong. Globe, 32d Cong., 2d Sess., 392 (1853). Although primarily concerned with individuals who were bringing fraudulent claims against the United States, *id.*, at 242, 295–296, Congress did not limit this early statute to fraudulent claims, but chose to draft a general provision encompassing the bribery not only of Members of Congress, but also of "any officer of the United States, *or person holding any place of [public] trust or profit, or discharging any official function* under, or in connection with, any department of the Government of the United States." (Emphasis supplied.)

When drafting § 201(a), Congress was aware of previous federal bribery statutes, as well as the judicial interpretation given those statutes. The phrase at issue here—"person acting for or on behalf of the United States"—was taken directly from predecessor bribery statutes.[11] Moreover, the reenactment of this language was no happenstance. Earlier versions of the 1962 statute omitted the phrase, but Department of Justice testimony that "its removal would be undesirable" convinced Congress to retain the language.[12]

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[9] One telling amendment came in 1948, largely as a result of this Court's decision in *United States* v. *Strang*, 254 U. S. 491 (1921). In *Strang*, the Court had considered whether a person working for a federally owned and controlled corporation was covered by the 1909 version of the federal conflict-of-interest statute. Act of Mar. 4, 1909, ch. 321, § 41, 35 Stat. 1097. The Court ruled that such a person was not covered because his employer was "a separate entity" from the United States. 254 U. S., at 493. To Congress, the *Strang* decision indicated that the existing federal bribery statute was inadequate to reach "the present ramifications of the executive branch [which] were not foreseen" when the 1909 Code was enacted. H. R. Rep. No. 304, 80th Cong., 1st Sess., A14 (1947). Accordingly, the 1948 Congress supplemented its earlier language to read "any officer or employee or person acting for or on behalf of the United States, *or any department or agency thereof*, in any official function, under or by authority of any *such department or agency*." Act of June 25, 1948, ch. 645, § 201, 62 Stat. 691 (italics indicate new language). While the 1948 amendment expressly broadened the scope of the federal bribery law, a House Report suggests that drafters of the 1948 revisions were uncertain whether the amendments were necessary and included them only to guarantee "what appeared unquestionably to be the intent of Congress, namely, to cover all persons acting for the United States Government in an official function." H. R. Rep. No. 304, *supra*, at A15.

[10] For instance, before 1948, employees of Government agencies were not expressly covered by the federal bribery statutes. See n. 9, *supra*. Nevertheless, federal courts repeatedly found that these employees were covered by the term "person acting for or on behalf of the United States." See, *e. g.*, *United States* v. *Birdsall*, 233 U. S. 223, 230–231 (1914); *United States* v. *Levine*, 129 F. 2d 745 (CA2 1942). But cf. *United States* v. *Strang*, *supra*.

Standing alone, Congress' purposeful retention of the "acting for or on behalf of the Government" phrase does not advance our inquiry into the scope and meaning of those words. When, however, we compare the phrase as enacted with the proposed definition of "public official" in earlier draft bills that were not enacted, we conclude that Congress could not have meant to restrict the definition, as petitioners argue, to those persons in an employment or agency relationship with the Federal Government. Such persons were clearly covered by successive, rejected versions of the reform bill, which defined "public official" in pertinent part as "an officer, agent, or employee of the United States in the executive, legislative, or judicial branch of the Government, or of any agency."[13] If Congress intended courts to restrict their reading of the jurisdictional definition to persons in a formal employment or agency relationship with the Government, it would have had no reason to accede to the Department of Justice's urging to retain the "acting for or on behalf of" language.

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[11] The term "any person acting for or on behalf of the United States" was coined in the recodifications of the 1870's, Rev. Stat. §§ 5451, 5501, and replaced the phrase "person holding any place of [public] trust or profit, or discharging any official function under, or in connection with [the Government]," which appeared in previous statutes. See n. 8, *supra*. For purposes of our decision today, it is of some relevance that the term "persons acting for or on behalf of the United States" was originally drafted as a stylistic substitution for "person[s] holding any [position] of [public] trust," and that Congress accepted the analogous language. See 2 Cong. Rec. 129 (1873) (remarks of Rep. Butler) (statutory Revision Committee's authority limited); Dwan & Feidler, The Federal Statutes—Their History and Use, 22 Minn. L. Rev. 1008, 1012–1017 (1938) (1878 version corrected congressionally identified errors in 1873 Rev. Stat.).

[12] Federal Conflict of Interest Legislation: Hearings on H. R. 302, H. R. 3050, H. R. 3411, H. R. 3412, and H. R. 7139 before the Antitrust Subcommittee of the House Committee on the Judiciary, 87th Cong., 1st Sess., 36 (1961). The Department of Justice analysis of H. R. 3411 stated:

"The definition of 'public official' . . . does not include any reference to persons 'acting for or in *[sic]* behalf of the United States.' This latter phrase appears in the existing law and we think its removal would be undesirable. Under the proposed definition it could be construed that, under certain circumstances, a person acting in behalf of the United States would not be held to be an 'officer, agent, or employee of the United States' as these terms are used in the bill. Persons acting in such a capacity should be protected from bribe offers (or punished for their acceptance)." *Ibid.*

Moreover, we find the legislative history of § 201(a) inconsistent with the view that the words "person acting for or on behalf of the United States" were added simply to bring within the jurisdiction of the federal bribery laws those individuals tied to the Federal Government by direct contractual obligations. Committee Reports from both Houses of Congress emphasized that the new bribery laws made "no significant changes of substance" and "would not restrict the broad scope of the present bribery statutes as construed by the courts." S. Rep. No. 2213, 87th Cong., 2d Sess., 4 (1962); H. R. Rep. No. 748, 87th Cong., 1st Sess., 17 (1961). Federal courts interpreting the federal bribery laws prior to 1962 had generally avoided formal distinctions, such as the requirement of a direct contractual bond, that would artificially narrow the scope of federal criminal jurisdiction. See n. 10, *supra*.

Of particular relevance to the instant case is the House Judiciary Committee's citation of the Second Circuit's decision in *United States* v. *Levine*, 129 F. 2d 745 (1942), as an example of how the judiciary had in the past properly construed the federal bribery laws. See H. R. Rep. No. 748, *supra*, at 17. The *Levine* decision involved the application of the 1909 bribery statute to a low-level official in a decentralized federal assistance program.[14] The defendant in *Levine* worked for a locally administered price stabilization program, the New York Metropolitan Milk Marketing Area,[15] and was responsible for receiving milk handlers' market surplus claims, and checking them for accuracy. Levine solicited a bribe from one of the handlers within his jurisdiction in return for his promise to prevent investigations of the claims.

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[13] See H. R. 12547, 85th Cong., 2d Sess., § 201(a) (1958); H. R. 2156, 86th Cong., 1st Sess., § 201(a) (1959); H. R. 3411, 87th Cong., 1st Sess., § 201(a) (1961). The complete definition of "public official" in each of these bills was: "Member of, or Delegate to Congress, or Resident Commissioner, either before or after he has qualified, an officer, agent, or employee of the United States in the executive, legislative, or judicial branch of the Government, or of any agency, or juror."

Although hired by a Market Administrator who, in turn, had been appointed by the Secretary of Agriculture, Levine himself was neither employed by the United States nor paid with federal funds. Nevertheless, Levine's duties were critical to the proper administration of the federally assisted New York Milk Marketing Area. Because claims for payment were not rechecked by anyone else, his duties resulted in expenditures from the Federal Treasury. After reviewing these facts, the Second Circuit concluded that, notwithstanding the absence of a direct contractual bond between the defendant and the United States, Levine's responsible position made him a "public official" for purposes of the federal bribery laws. 129 F. 2d, at 747. By explicitly endorsing the Second Circuit's analysis in *Levine*, the House Judiciary Committee strongly intimated that the phrase "acting for or on behalf of the United States" covers something more than a direct contractual bond.

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[14] At the time of the *Levine* opinion, the federal bribery statute applied by its terms only to officers of the United States or persons acting for or on behalf of the United States or Congress in any official capacity. § 117 of the Criminal Code of 1909, 18 U. S. C. § 207 (1946 ed.).

[15] The program was established by the Secretary of Agriculture to achieve goals set by the Agricultural Marketing Agreement Act of 1937. See 5 Fed. Reg. 1258 (1940). The Act authorized the Secretary to stabilize farm prices by issuing marketing orders to regulate production in whichever regions of the country were in need of such assistance. 7 U. S. C. §§ 601, 608c (1940 ed.). As such, the Act was an early form of federal assistance program, and, in its present form, is still classified as such. See Office of Management and Budget, Catalog of Federal Domestic Assistance § 10.155 (1983). A Marketing Administrator, appointed by the Secretary of Agriculture and paid with federal funds, was to supervise the Area. The Marketing Administrator was to hire his own staff to administer the price stabilization program locally. The staff salary and other administrative expenses were to be paid through a levy imposed on milk producers within the Area. 5 Fed. Reg. 1263 (1940).

Congress' longstanding commitment to a broadly drafted federal bribery statute, its expressed desire to continue that tradition with the 1962 revisions, its affirmative adoption of the language at issue in this case, and the House Report's endorsement of the Second Circuit's reasoning in *Levine*, combine to persuade us that Congress never intended § 201 (a)'s open-ended definition of "public official" to be given the cramped reading proposed by petitioners. We agree with the Government that § 201(a) has been accurately characterized as a "comprehensive statute applicable to all persons performing activities for or on behalf of the United States," whatever the form of delegation of authority.[16] To determine whether any particular individual falls within this category, the proper inquiry is not simply whether the person had signed a contract with the United States or agreed to serve as the Government's agent, but rather whether the person occupies a position of public trust with official federal responsibilities. Persons who hold such positions are public officials within the meaning of § 201 and liable for prosecution under the federal bribery statute.

B

Given the structure of the HCDA program and petitioners' responsible positions as administrators of the subgrant, we have little difficulty concluding that these persons served as public officials for purposes of § 201(a). As executives of UNI, petitioners had operational responsibility for the administration of the HCDA grant program within the city of Peoria. In allocating the federal resources made available to the city through the HCDA grant program, petitioners were charged with abiding by federal guidelines, which dictated both where and how the federal funds could be distributed. By accepting the responsibility for distributing these federal fiscal resources, petitioners assumed the quintessentially official role of administering a social service program established by the United States Congress.

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[16] Conflicts of Interest: Hearing on H. R. 8140 before the Senate Committee on the Judiciary, 87th Cong., 2d Sess., 22 (1962) (statement of Deputy Attorney General Katzenbach).

Lest there be any doubt that Congress intended § 201(a) to cover local officials like petitioners, one need only compare petitioners to the defendant in *Levine,* whose conviction the House Judiciary Committee explicitly endorsed. See *supra,* at 494–496. Both Levine and petitioners worked in decentralized federal assistance programs. Both Levine and petitioners effectively determined who would be the beneficiary of federal dollars, and both solicited bribes to influence their official decisions. Levine held a position of public trust with official federal responsibilities: to collect and investigate the accuracy of data submitted by milk producers in support of their claims for federal subsidies. Petitioners held a position of public trust with official federal responsibilities: allocating federal resources, pursuant to complex statutory and regulatory guidelines, in the form of residential rehabilitation contracts. Indeed, in certain respects, petitioners performed duties that were more clearly "official" and more obviously undertaken "for or on behalf of the United States" than the responsibilities of the defendant in *Levine.* Where Levine was paid through a levy imposed on local businesses participating in the marketing order, petitioners' salaries were completely funded by the HCDA grant. Where Levine simply compiled data that were submitted to the Department of Agriculture for eventual disbursement, petitioners personally bestowed the benefits of the HCDA program to residents of Peoria.

IV

A

In concluding that employment by the United States or some other similarly formal contractual or agency bond is not a prerequisite to prosecution under the federal bribery statute, we are supported by the majority of recent decisions in the Federal District Courts and Courts of Appeals. In *United States* v. *Hollingshead*, 672 F. 2d 751 (1982), the Ninth Circuit determined that an employee of the Federal Reserve Bank of San Francisco, which is a private banking institution, was a public official for purposes of § 201(a) because the employee was responsible for carrying out tasks delegated by a federal agency and was subject to substantial federal supervision. The defendant received bribes and kickbacks from independent contractors to influence him in making capital purchase requisitions. In short, like petitioners, he was in a position of responsibility, acting for or on behalf of the Federal Government in administering expenditure of federal funds. Similarly, in *United States* v. *Kirby*, 587 F. 2d 876, 879–880 (1978), the Seventh Circuit ruled that two privately employed grain inspectors, licensed by the Department of Agriculture, were public officials because they had responsibility for implementing a warehouse licensing program established by Congress.[17] For analogous reasons, the

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[17] Petitioners argue that the *Kirby* defendants were liable under the federal bribery statute only because the Grain Standards Act explicitly provides that grain inspectors are "persons acting for or on behalf of the United States" for purposes of § 201(a). See 7 U. S. C. § 84(d). We disagree with this analysis. The *Kirby* defendants acted under the United States Warehouse Act, 7 U. S. C. § 252, which unlike the Grain Standards Act makes no reference to § 201(a).

We also reject petitioners' more general argument that because § 201(a) is incorporated directly into the Grain Standards Act, Congress did not intend for § 201(a) to apply to other private individuals who conduct analogous services on behalf of the United States. Precisely this argument was

Federal District Court for the District of New Mexico found a state employee responsible for administering the Farmers Home Administration rural housing improvement grant program to be included within § 201(a). *United States* v. *Gallegos*, 510 F. Supp. 1112, 1113–1114 (1981). Again, the defendant's official duties in processing grant applications directly influenced the expenditure of federal funds. See also *United States* v. *Mosley*, 659 F. 2d 812 (CA7 1981); *Harlow* v. *United States*, 301 F. 2d 361 (CA5), cert. denied, 371 U. S. 814 (1962); *United States* v. *Griffin*, 401 F. Supp. 1222 (SD Ind. 1975), affirmance order *sub nom. United States* v. *Metro Management Corp.*, 541 F. 2d 284 (CA7 1976). But see *United States* v. *Loschiavo*, 531 F. 2d 659 (CA2 1976); *United States* v. *Del Toro*, 513 F. 2d 656 (CA2), cert. denied, 423 U. S. 826 (1975); *United States* v. *Hoskins*, 520 F. Supp. 410 (ND Ill. 1981).

B

By finding petitioners to be public officials within the meaning of § 201(a), we do not mean to suggest that the mere presence of some federal assistance brings a local organization and its employees within the jurisdiction of the federal bribery statute or even that all employees of local organizations responsible for administering federal grant programs are public officials within the meaning of § 201(a). To be a public official under § 201(a), an individual must possess some degree of official responsibility for carrying out a federal program or policy. Our opinion today is, therefore, fully consistent with *Krichman* v. *United States*, 256 U. S. 363

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raised in and disposed of by the Second Circuit in *Levine*, the case cited by Congress as correctly construing a predecessor of § 201(a). See *supra*, at 494–496. The Second Circuit wrote, and we agree:

> "The mere fact that several other Acts creating different agencies of government have specifically provided that the employees of those agencies are to be subject to this criminal provision does not, of course, mean that the broad provisions of the section are not applicable to this Market Administrator and his employees." 129 F. 2d, at 748.

(1921), in which this Court ruled that a baggage porter, although employed by a federally controlled railroad, could not be said to have "acted for or on behalf of the United States" because the porter lacked any duties of an official character. Similarly, individuals who work for block grant recipients and business people who provide recipients with goods and services cannot be said to be public officials under § 201(a) unless they assume some duties of an official nature.

We recognize that the manner in which the HCDA block grant program combines local administration with federal funding initially creates some confusion as to whether local authorities administering HCDA grants should be considered public officials under the federal bribery statute.[18] However, when one examines the structure of the program and sees that the HCDA vests in local administrators like petitioners Hinton and Dixson the power to allocate federal fiscal resources for the purpose of achieving congressionally established goals, the confusion evaporates and it becomes clear that these local officials hold precisely the sort of positions of national public trust that Congress intended to cover with the "acting for or on behalf of" language in the bribery statute.[19] The Federal Government has a strong and legitimate interest in prosecuting petitioners for their misuse of Government funds. As this Court has said in another, closely related context, grant funds to state and local governments "are as much in need of protection from [fraud] as any other federal money, and the statute does not make the extent of [grant moneys'] safeguard dependent upon the bookkeeping devices used for their distribution." *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537, 544 (1943) (footnote omitted) (holding that one who contracts with a local governmental unit to work on federally funded projects can "cheat the United States" through the state intermediary).

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[18] We have noted the juxtaposition of local control over daily operations and federal retention of oversight of its funds in another context. In *United States* v. *Orleans*, 425 U. S. 807 (1976), the Court noted that federal funding and federal regulation do not convert the acts of recipients, be they entrepreneurs or States, into federal governmental acts, for purposes of the Federal Tort Claims Act, precisely because the local entities, such as UNI, have complete control over daily operations. We also noted, however, that those entities are responsible to the United States for compliance with the specifications of a contract or grant. *Id.*, at 815–816. Regulation and oversight of the funds, as stressed in *Orleans*, is aimed precisely at the harm that occurred here—diversion of federal money to unauthorized purposes. *Id.*, at 818.

[19] Because the legislative history of § 201(a) shows that Congress intended the phrase "persons acting for or on behalf of the United States . . . in any official function" to encompass individuals like petitioners, we have no need to resort to the rule of lenity in deciding this case. "'The canon in

Because we agree with the Seventh Circuit that petitioners were public officials under § 201(a), the judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE O'CONNOR, with whom JUSTICE BRENNAN, JUSTICE REHNQUIST, and JUSTICE STEVENS join, dissenting.

The rule of lenity demands that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis* v. *United States*, 401 U. S. 808, 812 (1971). The Court concludes that congressional intent to include persons like petitioners within the coverage of 18 U. S. C. § 201 is clear enough to make the rule of lenity inapplicable. The statutory language admits of the Court's reading, and the case for that reading would be strong, though perhaps not persuasive, if § 201 were a civil statute. I differ with the Court in that I find the evidence of congressional intent too weak to meet the higher standard for resolving facial ambiguity against a defendant when interpreting a criminal statute. In my view, the evidence of intent offered by the Court's

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favor of strict construction [of criminal statutes] . . . does [not] demand that a statute be given the "narrowest meaning"; it is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers.'" *United States* v. *Moore*, 423 U. S. 122, 145 (1975), quoting *United States* v. *Brown*, 333 U. S. 18, 25–26 (1948).

opinion cannot carry the weight the Court places on it, and there is good reason to reject the Court's interpretation of the statute.

I

The language of § 201 and of its predecessors, as the Court's opinion points out, is intentionally broad. But that fact merely creates the interpretive problem—it does not resolve it. Congress intended to carry forward the pre-1962 bribery statute when it enacted § 201, and it understood the coverage of the bribery law to be broad. See *ante*, at 491–493, 494–495. Moreover, the purpose of the statute was undoubtedly to proscribe bribery of all those who carry out a federal trust. *Ante*, at 496. To say that the statute is broadly aimed at all persons bearing a federal trust, however, is not to resolve the ambiguity over what constitutes a federal trust. Indeed, the statutory language—"acting for or on behalf of the United States"—is merely a formulation of the public trust idea, and the Court concedes that the statutory language can accommodate both petitioners' and respondent's views. *Ante*, at 491. The breadth of the language accordingly offers little help in defining the ambiguous coverage of the statute.

The legislative history likewise provides no significant support for the Court's reading of the statute. The critical statutory language has been a part of the federal bribery statute for more than 100 years. See *ante*, at 493, n. 11. Yet, as the Court's opinion indicates, Congress apparently has never specifically considered the statute's coverage of federal grant recipients. The legislative history is simply silent on the question to be answered in these cases.

The Court mentions the 1948 extension of the bribery statute and suggests that it is significant. *Ante*, at 492, n. 9. As the legislative history of that extension makes clear, the only specific purpose of the extension was to ensure coverage of persons acting for federally owned or controlled corporations. *Ibid.;* H. R. Rep. No. 304, 80th Cong., 1st Sess., A14

(1947). There is no reason to believe, and it would be exceedingly odd to suggest, that Congress thought of federal grant recipients generally, or of grant recipients that are state or local governments in particular, as somehow analogous to federally controlled corporations. Accordingly, the 1948 extension provides no support for reading the bribery statute to cover persons like petitioners.

The legislative history of § 201 from the 87th Congress, which enacted the current version of the statute, contains two items that bear on the meaning of the statute's "acting for . . ." language. The Court relies heavily on these two items. One, however, offers no support for the Court's reading, and the other offers support of, at best, weak and uncertain significance.

First, the Court notes, *ante*, at 494–495, that the House Judiciary Committee cited *United States* v. *Levine*, 129 F. 2d 745 (CA2 1942), as an example of judicial construction of the statute. H. R. Rep. No. 748, 87th Cong., 1st Sess., 18 (1961). The Court concludes that this citation establishes congressional intent to include within the coverage of the bribery statute persons other than those with direct contractual bonds to the United States. *Ante*, at 496. That conclusion is surely correct. But saying that the class covered by the statute includes more than direct contractors does not begin to define the class actually covered and, in particular, does not imply that the class includes individuals employed by federal grant recipients or by their subgrantees.

Moreover, the *Levine* case itself does not suggest inclusion of such individuals. The individual involved in *Levine* was an employee of a person appointed by the Federal Government to carry out a federally defined regulatory task. As an employee of an agent of the United States, he was obviously acting for the United States. An employee of a grantee or subgrantee of the United States is in a quite different position. It is by no means obvious that such a person is acting for the United States, since a grantee does not necessarily have an agency relationship with the United States. Indeed, as the Court concedes, *ante*, at 499, not all recipients of federal grant funds are acting for the United States: for example, recipients of science research funds are surely not acting for the United States, even when they use some of those funds to purchase assistance in accordance with the federally approved grant proposal. That Congress approved the *Levine* case simply cannot support an inference that Congress intended the bribery statute to cover persons in petitioners' position.

The Court also relies on the 87th Congress' retention of the "acting for . . ." language after several bills not containing that language had been proposed. *Ante*, at 493–494. Those bills proscribed acceptance of a bribe by "an officer, agent, or employee of the United States in the executive, legislative, or judicial branch of the Government, or of any agency." See *ante*, at 494, n. 13. The Department of Justice recommended retention of the pre-1962 language because the proposed "officer, agent, or employee" language "could be construed" to be narrower than the "acting for . . ." language. See *ante*, at 493, n. 12. The Court accordingly concludes that Congress intended the bribery statute to cover more than those persons with a formal employment or agency relationship with the United States.

This conclusion is too strong. Neither the Department of Justice testimony nor anything else in the legislative history explains what persons were thought to be outside the coverage of the discarded bills but within the coverage of the "acting for . . ." language. For all the legislative history shows, no one in Congress or appearing before Congress had any such persons in mind. Indeed, the Court's interpretation of the statute suggests as much. Anyone who "occupies a position of public trust with official federal responsibilities," *ante*, at 496, would seem to be an "agent" of the United States when carrying out those responsibilities, since the Court gives meaning to its public trust test by requiring federal direction of the tasks to be performed by the person bribed, *ante*, at 496–498, 500. See Restatement (Second) of Agency § 1

(1958) (agency relationship created when one person agrees with another "that the other shall act on his behalf and subject to his control"). The most that can be said of Congress' reenactment of the "acting for . . ." language following the proposal and criticism of the alternative bills is that Congress thought that there could conceivably be some difference between the enacted and unenacted language and that the pre-1962 language should be retained out of caution, as Congress did not intend to narrow the coverage of the bribery statute.

The conclusion that employees of federal grant recipients or their subgrantees were intended to be covered by the federal bribery statute finds as little support in the cases cited by the Court, *ante*, at 498–499, as it does in the statutory language and legislative history. The only case from this Court that interpreted the language at issue is *Krichman* v. *United States*, 256 U. S. 363 (1921), and that case, if relevant at all, cannot support the Government, since it held that the defendant was not covered by the bribery statute. The lower court cases relied on by the Court that involve grant-in-aid programs are in conflict. Compare *United States* v. *Loschiavo*, 531 F. 2d 659 (CA2 1976); *United States* v. *Del Toro*, 513 F. 2d 656 (CA2 1975); *United States* v. *Hoskins*, 520 F. Supp. 410 (ND Ill. 1981), with *United States* v. *Mosley*, 659 F. 2d 812 (CA7 1981); 683 F. 2d 195 (CA7 1982) (decision below in these cases). Thus, there is no consistent lower court construction of the statute as it applies to grant recipients to bolster the Court's reading.

The other cases cited by the Court all involved persons in circumstances quite distinguishable from that of employees of federal grant recipients or their subgrantees. *United States* v. *Hollingshead*, 672 F. 2d 751 (CA9 1982), involved an employee of a "fiscal arm" of the Federal Government "carrying out tasks delegated by a government agency." *Id.*, at 754. *United States* v. *Kirby*, 587 F. 2d 876 (CA7 1978), involved persons acting under federal licenses as grain inspectors for the Federal Government. *United States* v. *Gallegos*, 510 F. Supp. 1112 (NM 1981), involved an individual who "had been assigned to work in an office of the Farmers Home Administration . . . to assist in administering an FHA program." *Id.*, at 1113. *Harlow* v. *United States*, 301 F. 2d 361 (CA5), cert. denied, 371 U. S. 814 (1962), involved an employee of a federal instrumentality operating on United States military bases. *United States* v. *Griffin*, 401 F. Supp. 1222 (SD Ind. 1975), affirmance order *sub nom. United States* v. *Metro Management Corp.*, 541 F. 2d 284 (CA7 1976), involved a person under direct contract with the Federal Government to solicit and receive bids for federal rehabilitation contracts and to prepare and inspect property that is under the control of the Federal Government and is eligible for such rehabilitation. In all of these cases the person bribed had a more or less direct agency relationship with the Federal Government. None of the cases dealt with a federal grant program and the accompanying uncertainty about whether the bribed person's activities were being carried out solely on the grantee's behalf, though with financial support from the Federal Government, or were being carried out on behalf of the Federal Government.

In sum, neither the statutory language, legislative history, nor case law provides any persuasive evidence that Congress intended the federal bribery statute to apply to persons in petitioners' position. The Court's conclusion requires some affirmative reason to believe that Congress thought that employees of federal grant recipients or their subgrantees are acting for or on behalf of the Federal Government, even when the grant recipient is a state or local government. No such reason, and certainly no reason strong enough to escape the pull of the rule of lenity, has been advanced.

II

Not only is there an absence of support for the Court's conclusion, but there are several reasons to reject it. Federal grant programs to state and local governments as well as to private organizations have been in existence since the 19th century. See 1 R. Cappalli, Federal Grants and Cooperative

Agreements §§1.19–1.22 (1982); Elazar, Federal-State Collaboration in the Nineteenth Century United States, 79 Pol. Sci. Q. 248 (1964). By the middle of this century, grant programs to state governments in particular were a major component of the federal budget. When Congress enacted §201 in 1962, it was spending more than $7 billion a year, or approximately 7% of the federal budget, on grants to state and local governments. See United States Bureau of the Census, Historical Statistics of the United States, Colonial Times to 1970, Part 2, pp. 1123, 1125 (1975). That amount increased to more than $40 billion by 1975 and today stands at approximately $90 billion, more than 10% of the federal budget. See Executive Office of the President, Office of Management and Budget, Special Analyses, Budget of the United States Government, Fiscal Year 1984, p. H–16 (1983).

Against this background, the long congressional and judicial silence on the application of the federal bribery statute to persons like petitioners takes on added significance. Despite the magnitude of federal grant programs in general and of federal programs making grants to state and local government in particular, there is no indication that Congress has ever considered whether employees of grant recipients are "public officials" within the meaning of the federal bribery statute, even though Congress studied and revised the statute in both 1948 and 1962. Moreover, there appears to be no reported case involving a prosecution against such employees under §201 or its predecessors until the early 1970's. The Second Circuit's 1975 case, *United States* v. *Del Toro*, *supra*, decided at a time when federal grants to state and local governments totaled more than $40 billion, is apparently the first case to have presented the problem. Given that bribery of persons responsible for administering federal grant funds is exceedingly unlikely to be a recent phenomenon, cf. *United States ex rel. Marcus* v. *Hess*, 317 U. S. 537 (1943) (bid-rigging by contractors with local governments administering federal funds); *United States* v. *Laudani*, 320

U. S. 543 (1944) (kickbacks to subcontractor of Port of New York Authority on project receiving federal grant money), the most plausible inference is that neither Congress nor federal prosecutors believed that the federal bribery statute extended to employees of federal grant recipients or their subgrantees, at least when the grantee is a state or local government.

That inference is supported by the fact that federal grant programs generally, and grant-in-aid programs to state and local governments in particular, are categorically different, and are treated by law as categorically different, from other types of federal activity. Such programs have been treated as forming a distinctive category of governmental activity by statute, see Federal Grant and Cooperative Agreement Act of 1977, 92 Stat. 3, 41 U. S. C. §§501–506, 508, 509 (1976 ed. and Supp. V), and by regulation, see 1 R. Cappalli, *supra*, §§5.01–5.56. The main defining characteristic of the category is the principle of grantee autonomy: although grants impose conditions on the use of grant funds, grantees are left considerable discretion to design and execute the federally assisted programs without federal intrusion. See 41 U. S. C. §504 (1976 ed., Supp. V) (definition of "grant" requires that "no substantial involvement is anticipated between the executive agency, acting for the Federal Government, and the State or local government or other recipient during performance of the contemplated activity"); 1 R. Cappalli, *supra*, §1.07. That principle means that the grantee's activities are typically not attributable to the United States, see *United States* v. *Orleans*, 425 U. S. 807 (1976) (not attributable for purposes of tort liability), and suggests that those activities are not undertaken on behalf of the Federal Government, cf. Restatement (Second) of Agency §14 and Comment *a* (1958) (principal has right to control conduct of agent, and an "agent is subject to a duty not to act contrary to the principal's directions, although the principal has agreed not to give such directions"). Indeed, in different though related contexts this Court has recognized that "[g]rants of federal funds generally do not . . . serve to convert the acts of the recipient from private acts to governmental acts absent extensive, detailed, and virtually day-to-day supervision." *Forsham* v. *Harris*, 445 U. S. 169, 180 (1980); see also *id.*, at 180, n. 11 ("Before characterizing an entity as 'federal' for some purpose, this Court has required a threshold showing of substantial federal supervision of the private activities, and not just the exercise of regulatory authority necessary to assure compliance with the goals of the federal grant"); *United States* v. *Orleans*, *supra*, at 815.

The principle of grantee autonomy is basic to all grant programs, but its significance is greatest in two circumstances especially relevant to these cases. First, grantee autonomy is strongest in "block grant" programs, such as the Housing and Community Development Block Grant program at issue here. In such programs, federal control over the spending of the distributed funds is minimized, and the grant recipient cannot plausibly be said to be acting for anyone but itself. The Federal Government increasingly uses block grants for its grants-in-aid to state and local governments. See 1 R. Cappalli, *supra*, §§ 1.33–1.51 (describing characteristics of block grants and noting major shift toward block grants in 1981); United States Advisory Commission on Intergovernmental Relations, Block Grants: A Comparative Analysis (1977).

Second, the principle of grantee autonomy applies with special force when federal grant recipients are state or local governments. Principles of federalism inherent in our constitutional system have long played a significant role in the congressional creation of federal grant-in-aid programs. See R. Shapek, Managing Federalism: Evolution and Development of the Grant-in-Aid System (1981). Such principles must shape the construction of the statutory language at issue in these cases. They demand a strong presumption that state and local governments are carrying out their own policies and are acting on their own behalf, not on behalf of the United States, even when their programs are being funded by the United States. A proper respect for the sovereignty of States requires that federal programs not be interpreted to deputize States or their political subdivisions to act on behalf of the United States unless such deputy status is expressly accepted or, where lawful, expressly imposed. It would be inconsistent with the general relationship between the Federal and State Governments to conclude, absent such express actions, that a State is acting in effect as an agent of the United States.

Congress apparently entertained a similar thought when it amended the Grain Standards Act in 1976 to apply § 201 to federally licensed grain inspectors employed by a state agency to exercise federally delegated authority to conduct official inspections of grain. Pub. L. 94–582, § 10, 90 Stat. 2877, 7 U. S. C. § 84(d). If the inspectors had not been state employees, it would have been perfectly apparent—on the authority of *United States* v. *Levine*, 129 F. 2d 745 (CA2 1942), for example—that they were acting on behalf of the United States. See *United States* v. *Kirby*, 587 F. 2d 876, 879–880 (CA7 1978). Congress believed that the federal bribery statute had not previously applied when it enacted the 1976 amendment. See H. R. Rep. No. 94–966, p. 5 (1976); S. Rep. No. 94–747, pp. 9, 17 (1976); S. Conf. Rep. No. 94–1389, p. 47 (1976). The inference seems inescapable that Congress thought it extraordinary, and worth explicit statutory direction, for state employees not actually on detail to the Federal Government to be considered to be acting on behalf of the United States.

Thus, federal grants, especially when the grant recipient is a state or local government, create a distinctive type of relationship between the Federal Government and employees of the grant recipient or its subgrantees. Congress has recognized as much. For the Court to apply the bribery statute to petitioners is to extend the statute to a class of individuals that Congress thinks of as different from that of any others it has intended § 201 to cover and whose relation to the Federal Government raises problems of autonomy and federalism never addressed by Congress in the context of the federal bribery statute. Consequently, with respect to employees of grant recipients or their subgrantees, at least when the grant recipient is a state or local government (as it is in these cases), I do not think that the rule of lenity can be overcome.

Finally, I think it especially inappropriate to construe an ambiguous criminal statute unfavorably to the defendant when the construction that is adopted leaves the statute as unclear in its coverage as the bare statutory language. The rule of lenity rests on the notion that people are entitled to know in advance whether an act they contemplate taking violates a particular criminal statute, even if the act is obviously condemnable and even if it violates other criminal statutes.*

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*Most if not all States criminally proscribe bribery and acceptance of bribes, though the statutes vary in their definitions of the required relationship of the person bribed to the government. See 12 Am. Jur. 2d, Bribery §§ 1–3, 12–14 (1964 and Supp. 1983). For example, the Illinois bribery statute provides that a person receiving money or property commits bribery if he

> "receives, retains or agrees to accept any property or personal advantage which he is not authorized by law to accept knowing that such property or personal advantage was promised or tendered with intent to cause him to influence the performance of any act related to the employment or function of any public officer, public employee or juror . . . or . . . [h]e solicits any property or personal advantage which he is not authorized by law to accept pursuant to an understanding that he shall influence the performance of any act related to the employment or function of any public officer, public employee or juror." Ill. Rev. Stat., ch. 38, § 33–1 (1977).

It is, of course, a question outside this Court's jurisdiction whether any given state bribery law covers persons, like petitioners, who are employed by an organization that has contracted with a local government to administer funds received by the local government under a federal grant.

The "public trust" standard adopted by the Court provides no more guidance to employees of a grant recipient or its subgrantee than does the statutory language, "acting for or on behalf of the United States." There are hundreds of federal grant programs. See Executive Office of the President, Office of Management and Budget, 1983 Catalog of Federal Domestic Assistance. Yet it is impossible to tell from the Court's analysis just what sorts of federal regulation make a grant recipient subject to the bribery statute. A criminal statute, after if not before it is judicially construed, should have a discernible meaning. I do not think the Court offers one.

I respectfully dissent.

NATIONAL LABOR RELATIONS BOARD *v.* BILDISCO & BILDISCO, DEBTOR-IN-POSSESSION, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 82–818. Argued October 11, 1983—Decided February 22, 1984*

Section 365(a) of the Bankruptcy Code (Code) provides that, with certain exceptions, the trustee, subject to the Bankruptcy Court's approval, may assume or reject "any executory contract" of the debtor. In April 1980, respondent debtor (hereafter respondent), a building supplies distributor, filed a voluntary petition in bankruptcy for reorganization under Chapter 11 of the Code, and was subsequently authorized by the Bankruptcy Court to operate the business as a debtor-in-possession. At the time the petition was filed, some of respondent's employees were represented by petitioner Union with whom respondent had negotiated a collective-bargaining agreement that was to expire in April 1982. Beginning in January 1980, respondent failed to meet some of its obligations under the agreement, including the payment of health and pension benefits and the remittance to the Union of dues collected, and in May 1980 respondent refused to pay wage increases called for in the agreement. Thereafter, respondent requested and received permission from the Bankruptcy Court to reject the agreement, and the Union was allowed 30 days in which to file a claim for damages stemming from the rejection. The District Court upheld the order. In the summer of 1980, the Union filed unfair labor practice charges with the National Labor Relations Board (Board), which found that respondent had violated §§ 8(a)(5) and 8(a)(1) of the National Labor Relations Act (NLRA) by unilaterally changing the terms of the collective-bargaining agreement and by refusing to negotiate with the Union, and ordered respondent to make the pension and health contributions and to remit dues to the Union. Consolidating the Union's appeal from the District Court's order and the Board's petition for enforcement of its order, the Court of Appeals held that a collective-bargaining agreement is an executory contract subject to rejection by a debtor-in-possession under § 365(a) of the Code; that the debtor-in-possession's authority to seek rejection of the

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*Together with No. 82–852, *Local 408, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America* v. *National Labor Relations Board et al.*, also on certiorari to the same court.

agreement was not qualified by § 8(d) of the NLRA; but that to obtain rejection a debtor-in-possession must show not only that the agreement burdens the estate but also that the equities balance in favor of rejection. The case was remanded for the Bankruptcy Court's reconsideration in light of these standards. The Court of Appeals refused to enforce the Board's order, rejecting the Board's conclusion that respondent, as a debtor-in-possession, was the alter ego of the prepetition employer, and holding that under the Code a debtor-in-possession was deemed a "new entity" not bound by the debtor's prior collective-bargaining agreement.

Held:

1. The language "executory contract" in § 365(a) of the Code includes collective-bargaining agreements subject to the NLRA, and the Bankruptcy Court should permit rejection of such an agreement under § 365(a) if the debtor can show that the agreement burdens the estate and that the equities balance in favor of rejection. Pp. 521–527.

(a) Any inference that collective-bargaining agreements are not included within the general scope of § 365(a) because they differ for some purposes from ordinary contracts is rebutted by § 365(a)'s statutory design and by the language of § 1167 of the Code expressly exempting from § 365(a) collective-bargaining agreements subject to the Railway Labor Act. The failure to grant a similar exemption to agreements subject to the NLRA indicates that Congress intended § 365(a) to apply to all collective-bargaining agreements covered by the NLRA. Pp. 521–523.

(b) Because of the special nature of a collective-bargaining agreement, and the consequent "law of the shop" that it creates, a somewhat stricter standard than the "business judgment" standard applied to authorize rejection of an ordinary executory contract should govern the Bankruptcy Court's decision to allow rejection of a collective-bargaining agreement. But a standard that would require respondent to demonstrate that its reorganization will fail unless rejection is permitted is at odds with the flexibility and equity built into Chapter 11 and subordinates the multiple, competing considerations underlying a Chapter 11 reorganization to the issue of whether rejection of the agreement is necessary to prevent the debtor from going into liquidation. Pp. 523–526.

(c) Before acting on a petition to modify or reject a collective-bargaining agreement, the Bankruptcy Court should be persuaded that reasonable efforts to negotiate a voluntary modification have been made and are not likely to produce a prompt and satisfactory solution. If the parties are unable to agree, a decision on the rejection of the agreement may become necessary to the reorganization process. But since the policy of Chapter 11 is to permit successful rehabilitation of debtors, rejection should not be permitted without a finding that that policy would be served by such action. Determining what would constitute a successful rehabilitation involves balancing the interests of the debtor, creditors, and employees, and in striking the balance the court must consider not only the degree of hardship faced by each party but also any qualitative differences between the types of hardship each may face. Pp. 526–527.

2. A debtor-in-possession does not commit an unfair labor practice when it unilaterally rejects or modifies a collective-bargaining agreement before formal rejection is approved by the Bankruptcy Court. Pp. 527–534.

(a) To hold that the debtor commits an unfair labor practice under such circumstances would undermine whatever benefit the debtor otherwise obtains by its authority to request rejection of the agreement. The difference between a Chapter 11 reorganization, wherein the debtor-in-possession has until a reorganization plan is confirmed to decide whether to accept or reject an executory contract, and a Chapter 7 liquidation, wherein the trustee has only 60 days from the order for relief in which to make such a decision, reflects Congress' considered judgment that a debtor-in-possession seeking to reorganize should be granted more latitude in making the decision than should a trustee in liquidation. Pp. 528–529.

(b) Since recovery on a claim arising from a debtor-in-possession's rejection of an executory collective-bargaining agreement after the filing of a petition in bankruptcy may be had only through administration of the claim in bankruptcy and not by a suit against the debtor-in-possession under the agreement, the Board is necessarily precluded from, in effect, enforcing the agreement by filing an unfair labor practice charge against the debtor-in-possession for violating § 8(d) of the NLRA. Such enforcement would run directly counter to the Code's express provisions and to its overall effort to give a debtor-in-possession some flexibility and breathing space. From the filing of the bankruptcy petition until formal acceptance, the collective-bargaining agreement is not an enforceable contract within the meaning of § 8(d). Accordingly, the debtor-in-possession need not comply with § 8(d) prior to seeking the Bankruptcy Court's permission to reject the agreement. It necessarily follows that any corresponding duty to bargain to impasse under § 8(a)(5) and § 8(d) before seeking rejection must also be subordinated to the exigencies of bankruptcy. Pp. 529–534.

682 F. 2d 72, affirmed.

REHNQUIST, J., delivered the opinion of the Court, in Parts I and II of which all other Members joined, and in Part III of which BURGER, C. J., and POWELL, STEVENS, and O'CONNOR, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which WHITE, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 535.

Deputy Solicitor General Wallace argued the cause for the National Labor Relations Board. With him on the briefs were *Solicitor General Lee, Carolyn F. Corwin, Norton J. Come, Linda Sher,* and *James Y. Callear.*

James R. Zazzali argued the cause for petitioner in No. 82–852. With him on the brief was *Kenneth I. Nowak.*

Jack M. Zachin argued the cause and filed a brief for respondents in No. 82–818.†

JUSTICE REHNQUIST delivered the opinion of the Court.

Two important and related questions are presented by these petitions for certiorari: (1) under what conditions can a Bankruptcy Court permit a debtor-in-possession to reject a collective-bargaining agreement; (2) may the National Labor Relations Board find a debtor-in-possession guilty of an unfair labor practice for unilaterally terminating or modifying a collective-bargaining agreement before rejection of that agreement has been approved by the Bankruptcy Court. We decide that the language "executory contract" in § 365(a) of the Bankruptcy Code, 11 U. S. C. § 365(a) (1982 ed.), includes within it collective-bargaining agreements subject to the National Labor Relations Act, and that the Bankruptcy Court may approve rejection of such contracts by the debtor-in-possession upon an appropriate showing. We also decide that a debtor-in-possession does not commit an unfair labor practice when, after the filing of a bankruptcy petition but before court-approved rejection of the collective-bargaining agreement, it unilaterally modifies or terminates one or more provisions of the agreement. We therefore affirm the judgment of the Court of Appeals for the Third Circuit in these cases.

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†Briefs of *amicus curiae* urging reversal were filed for the American Federation of Labor and Congress of Industrial Organizations by *J. Albert Woll, Laurence Gold,* and *Claude Montgomery;* and for the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America by *David Previant* and *Robert M. Baptiste.*

John S. Irving, Carl L. Taylor, and *Stephen A. Bokat* filed a brief for the Chamber of Commerce of the United States as *amicus curiae* urging affirmance.

Michael H. Holland and *James C. Kuhn III* filed a brief for the United Mine Workers of America, International Union, as *amicus curiae.*

I

A

On April 14, 1980, respondent Bildisco and Bildisco (Bildisco), a New Jersey general partnership in the business of distributing building supplies, filed a voluntary petition in bankruptcy for reorganization under Chapter 11 of the Bankruptcy Code, 11 U. S. C. § 1101 *et seq.* (1982 ed.).[1] Bildisco was subsequently authorized by the Bankruptcy Court to operate the business as debtor-in-possession under 11 U. S. C. § 1107 (1982 ed.).[2]

At the time of the filing of the petition in bankruptcy, approximately 40 to 45 percent of Bildisco's labor force was represented by Local 408 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Union). Bildisco had negotiated a 3-year collective-bargaining agreement with the Union that was to expire on April 30, 1982, and which expressly provided that it was binding on the parties and their successors even though bankruptcy should supervene. Beginning in January 1980, Bildisco failed to meet some of its obligations under the collective-bargaining agreement, including the payment of health and pension benefits and the remittance to the Union of dues collected under the agreement. In May 1980, Bildisco refused to pay wage increases called for in the collective-bargaining agreement.

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[1] Chapter 11 of the present Bankruptcy Code was part of the Bankruptcy Reform Act of 1978, Pub. L. 95-598, 92 Stat. 2549. The first major revision of the bankruptcy laws since 1938, the Bankruptcy Reform Act consolidated three reorganization chapters of the former Bankruptcy Act into a single business reorganization chapter, with the intention that business reorganizations should be quicker and more efficient and provide greater protection to the debtor, creditors, and the public interest. See H. R. Rep. No. 95-595, p. 5 (1977).

[2] Title 11 U. S. C. § 1107 (1982 ed.) provides:

"(a) Subject to any limitations on a trustee under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter."

Although the term "debtor-in-possession" is not fully interchangeable with the term "trustee in bankruptcy" under the Bankruptcy Code, with respect to the issues before us the analysis is the same whether it is the debtor-in-possession or trustee in bankruptcy who is attempting to reject a collective-bargaining agreement.

In December 1980, Bildisco requested permission from the Bankruptcy Court, pursuant to 11 U. S. C. § 365(a) (1982 ed.),[3] to reject the collective-bargaining agreement. At the hearing on Bildisco's request the sole witness was one of Bildisco's general partners, who testified that rejection would save his company approximately $100,000 in 1981. The Union offered no witnesses of its own, but cross-examined the witness for Bildisco. On January 15, 1981, the Bankruptcy Court granted Bildisco permission to reject the collective-bargaining agreement and allowed the Union 30 days in which to file a claim for damages against Bildisco stemming from the rejection of the contract. The District Court upheld the order of the Bankruptcy Court, and the Union appealed to the Court of Appeals for the Third Circuit.

B

During midsummer 1980, the Union filed unfair labor practice charges with the National Labor Relations Board (Board). The General Counsel of the Board issued a complaint alleging that Bildisco had violated § 8(a)(5) and § 8(a)(1) of the National Labor Relations Act (NLRA), 29 U. S. C.

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[3] Title 11 U. S. C. § 365(a) (1982 ed.) reads:

"(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor."

§ 158(a)(5) and § 158(a)(1),[4] by unilaterally changing the terms of the collective-bargaining agreement, in failing to pay certain contractually mandated fringe benefits and wage increases and to remit dues to the Union. Ultimately the Board found that Bildisco had violated § 8(a)(5) and § 8(a)(1) of the NLRA by unilaterally changing the terms of the collective-bargaining agreement and by refusing to negotiate with the Union. Bildisco was ordered to make the pension, health, and welfare contributions and to remit dues to the Union, all as required under the collective-bargaining agreement. The Board petitioned the Court of Appeals for the Third Circuit to enforce its order.

C

The Court of Appeals consolidated the Union's appeal and the Board's petition for enforcement of its order. *In re Bildisco*, 682 F. 2d 72 (1982). That court held that a collective-bargaining agreement is an executory contract subject to rejection by a debtor-in-possession under § 365(a) of the Bankruptcy Code. The authority of the debtor-in-possession to seek rejection of the collective-bargaining agreement was not qualified by the restrictions of § 8(d) of the NLRA, which established detailed guidelines for mid-term modification of collective-bargaining agreements,[5] be-

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[4] Section 8(a) of the NLRA, 61 Stat. 140, 29 U. S. C. § 158(a), provides in pertinent part:

"(a) Unfair labor practices by employer

"It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

. . . . .

"(5) to refuse to bargain collectively with the representatives of his employees . . . ."

[5] Section 8(d) of the NLRA, 61 Stat. 142, 29 U. S. C. § 158(d), reads in relevant part:

"(d) Obligation to bargain collectively

"For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the cause in the court's view, the debtor-in-possession was a "new entity" not bound by the labor agreement. The Court of Appeals concluded, however, that given the favored status Congress has accorded collective-bargaining agreements, a debtor-in-possession had to meet a more stringent test than the usual "business judgment" rule to obtain rejection. The Court of Appeals accepted the standard applied by the Court of Appeals for the Second Circuit in *Shopmen's Local Union No. 455* v. *Kevin Steel Products, Inc.*, 519 F. 2d 698, 707

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employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

"(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

"(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

"(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute . . .; and

"(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

"The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) . . . shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. . . ."

(1975), and required the debtor-in-possession to show not only that the collective-bargaining agreement is burdensome to the estate, but also that the equities balance in favor of rejection. The case was remanded for the Bankruptcy Court's reconsideration in light of the standards enunciated.

The Court of Appeals refused to enforce the Board's order, rejecting the Board's conclusion that Bildisco, as debtor-in-possession, was the alter ego of the prepetition employer. Under the Bankruptcy Code, a debtor-in-possession was deemed a "new entity" not bound by the debtor's prior collective-bargaining agreement. Because rejection relates back to the filing of a petition, the Court of Appeals held that if Bildisco were permitted to reject the contract, the Board was precluded from premising an unfair labor practice on Bildisco's rejection of the labor contract. The Court of Appeals implied that if the Bankruptcy Court determined that the collective-bargaining agreement should not be rejected, the Board could find a violation of § 8(d) of the NLRA.

We granted certiorari to review the decision of the Court of Appeals because of the apparent conflict between that decision and the decision of the Court of Appeals for the Second Circuit in *Brotherhood of Railway, Airline and Steamship Clerks* v. *REA Express, Inc.*, 523 F. 2d 164, cert. denied, 423 U. S. 1017 (1975).

II

Section 365(a) of the Bankruptcy Code, 11 U. S. C. § 365(a) (1982 ed.), provides in full:

> "(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor."

This language by its terms includes all executory contracts except those expressly exempted, and it is not disputed by the parties that an unexpired collective-bargaining agreement is an executory contract.[6] Any inference that collective-bargaining agreements are not included within the general scope of § 365(a) because they differ for some purposes from ordinary contracts, see *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543, 550 (1964), is rebutted by the statutory design of § 365(a) and by the language of § 1167 of the Bankruptcy Code. The text of § 365(a) indicates that Congress was concerned about the scope of the debtor-in-possession's power regarding certain types of executory contracts, and purposely drafted § 365(a) to limit the debtor-in-possession's power of rejection or assumption in those circumstances.[7] Yet none of the express limitations on the debtor-in-possession's general power under § 365(a) apply to collective-bargaining agreements. Section 1167, in turn, expressly exempts collective-bargaining agreements subject to the Railway Labor Act, but grants no similar exemption to agreements subject to the NLRA.[8] Obviously, Congress

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[6] The Bankruptcy Code furnishes no express definition of an executory contract, see 11 U. S. C. § 365(a) (1982 ed.), but the legislative history of § 365(a) indicates that Congress intended the term to mean a contract "on which performance remains due to some extent on both sides." H. R. Rep. No. 95–595, p. 347 (1977); see S. Rep. No. 95–989, p. 58 (1978). We reject the argument of *amicus* United Mine Workers of America that a collective-bargaining agreement is not an executory contract within the meaning of § 365(a). Under their labor contract both Bildisco and the Union had reciprocal obligations, and at any point during the life of the contract, performance was due by both parties. See Labor Contract between Bildisco and Teamsters Local No. 408, App. 78–115.

[7] Although Congress granted the debtor-in-possession a broad power to assume or reject executory contracts, it qualified that power in certain situations. Very generally, subsections (b) and (c) limit the debtor-in-possession's or trustee's power of assumption in several circumstances; subsection (d) requires assumption or rejection within 60 days in cases of liquidation. Bankruptcy Code § 765 and § 766 limit the power of rejection or assumption in the case of the liquidation of a commodity brokerage business.

[8] Title 11 U. S. C. § 1167(a) (1982 ed.) reads in full:

"Notwithstanding section 365 of this title, neither the court nor the trustee may change the wages or working conditions of employees of the knew how to draft an exclusion for collective-bargaining agreements when it wanted to; its failure to do so in this instance indicates that Congress intended that § 365(a) apply to all collective-bargaining agreements covered by the NLRA.

None of the parties to these cases dispute the foregoing proposition. But the Board contends that the standard by which the Bankruptcy Court must judge the request of a debtor-in-possession to reject a collective-bargaining contract must be stricter than the traditional "business judgment" standard applied by the courts to authorize rejection of the ordinary executory contract. See *Group of Institutional Investors* v. *Chicago, M., St. P. & P. R. Co.*, 318 U. S. 523, 550 (1943); see also *In re Minges*, 602 F. 2d 38, 42 (CA2 1979); *In re Tilco, Inc.*, 558 F. 2d 1369, 1372 (CA10 1977). The Union also contends that the debtor-in-possession must comply with the procedural requirements of § 8(d) of the NLRA, or at a minimum, bargain to impasse before it may request the Bankruptcy Court either to assume or to reject the collective-bargaining agreement.

Although there is no indication in § 365 of the Bankruptcy Code that rejection of collective-bargaining agreements should be governed by a standard different from that governing other executory contracts, all of the Courts of Appeals which have considered the matter have concluded that the standard should be a stricter one. See *In re Brada Miller Freight System, Inc.*, 702 F. 2d 890 (CA11 1983); *In re Bildisco*, 682 F. 2d 72 (CA3 1982); see also *Local Joint Executive Board* v. *Hotel Circle, Inc.*, 613 F. 2d 210 (CA9 1980)

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debtor established by a collective-bargaining agreement that is subject to the Railway Labor Act (45 U. S. C. 151 et seq.) except in accordance with section 6 of such Act (45 U. S. C. 156)."

This provision was derived from former § 77(n) of the Bankruptcy Act. Reflective of the longstanding special treatment afforded railway labor, see *Railway Employees* v. *Hanson*, 351 U. S. 225, 232, and n. 5 (1956), Congress determined that "the subject of railway labor is too delicate . . . for this code to upset established relationships." H. R. Rep. No. 95–595, p. 423 (1977).

(rejection under the Bankruptcy Act); *Shopmen's Local Union No. 455* v. *Kevin Steel Products, Inc.*, 519 F. 2d 698 (CA2 1975) (same). We agree with these Courts of Appeals that because of the special nature of a collective-bargaining contract, and the consequent "law of the shop" which it creates, see *John Wiley & Sons, supra; Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 578–579 (1960), a somewhat stricter standard should govern the decision of the Bankruptcy Court to allow rejection of a collective-bargaining agreement.

The Union and the Board argue that in light of the special nature of rights created by labor contracts, Bildisco should not be permitted to reject the collective-bargaining agreement unless it can demonstrate that its reorganization will fail unless rejection is permitted. This very strict standard was adopted by the Second Circuit in *Brotherhood of Railway, Airline and Steamship Clerks* v. *REA Express, Inc.*, 523 F. 2d, at 167–169, decided under the former Bankruptcy Act three years before § 365(a) was passed by Congress. Under the canon of statutory construction that Congress is presumed to be aware of judicial interpretations of a statute, the Board argues that Congress should be presumed to have adopted the interpretation of the Second Circuit when it enacted § 365(a). See *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U. S. 353, 379–382 (1982); *Lorillard* v. *Pons*, 434 U. S. 575, 580–581 (1978). The Board makes a related argument that Congress was fully aware of the strict standard for rejection established in *REA Express* and approved that standard when enacting § 365(a) of the Bankruptcy Code. In the legislative history accompanying § 82 of the Bankruptcy Act, a provision relating to municipal bankruptcies, the Report of the House Committee on the Judiciary referred to *Kevin Steel Products, supra*, and *REA Express, supra*, as authority for the proposition that a stricter showing than the "business judgment" test was necessary to reject a collective-bargaining agreement. See H. R. Rep.

No. 94–686, pp. 17–18 (1975). Since Congress made § 365(a) applicable to municipal bankruptcies, see 11 U. S. C. § 901(a) (1982 ed.), the Board argues that this reference to *REA Express* supports an inference that Congress adopted the *REA Express* standard for rejecting collective-bargaining agreements when it enacted § 365(a).

These arguments are wholly unconvincing. Quite simply, *Kevin Steel* and *REA Express* reflect two different formulations of a standard for rejecting collective-bargaining agreements. Congress cannot be presumed to have adopted one standard over the other without some affirmative indication of which it preferred. The reference in the House Report to *Kevin Steel* and *REA Express* also cannot be considered a congressional endorsement of the stricter standard imposed on rejection of collective-bargaining agreements by the Second Circuit in *REA Express*, since the Report indicates no preference for either formulation. At most, the House Report supports only an inference that Congress approved the use of a somewhat higher standard than the "business judgment" rule when appraising a request to reject a collective-bargaining agreement.

The standard adopted by the Court of Appeals for the Second Circuit in *REA Express* is fundamentally at odds with the policies of flexibility and equity built into Chapter 11 of the Bankruptcy Code. The rights of workers under collective-bargaining agreements are important, but the *REA Express* standard subordinates the multiple, competing considerations underlying a Chapter 11 reorganization to one issue: whether rejection of the collective-bargaining agreement is necessary to prevent the debtor from going into liquidation. The evidentiary burden necessary to meet this stringent standard may not be insurmountable, but it will present difficulties to the debtor-in-possession that will interfere with the reorganization process.

We agree with the Court of Appeals below, and with the Court of Appeals for the Eleventh Circuit in a related case, *In re Brada Miller Freight System, Inc.*, *supra*, that the Bankruptcy Court should permit rejection of a collective-bargaining agreement under § 365(a) of the Bankruptcy Code if the debtor can show that the collective-bargaining agreement burdens the estate, and that after careful scrutiny, the equities balance in favor of rejecting the labor contract. The standard which we think Congress intended is a higher one than that of the "business judgment" rule, but a lesser one than that embodied in the *REA Express* opinion of the Court of Appeals for the Second Circuit.

Before acting on a petition to modify or reject a collective-bargaining agreement, however, the Bankruptcy Court should be persuaded that reasonable efforts to negotiate a voluntary modification have been made and are not likely to produce a prompt and satisfactory solution. The NLRA requires no less. Not only is the debtor-in-possession under a duty to bargain with the union under § 8(a)(5) of the NLRA, 29 U. S. C. § 158(a)(5), see *infra*, at 534, but the national labor policies of avoiding labor strife and encouraging collective bargaining, § 1, NLRA, 29 U. S. C. § 151, generally require that employers and unions reach their own agreements on terms and conditions of employment free from governmental interference. See, *e. g.*, *Howard Johnson Co.* v. *Hotel Employees*, 417 U. S. 249 (1974); *NLRB* v. *Burns International Security Services, Inc.*, 406 U. S. 272, 282–294 (1972). The Bankruptcy Court need step into this process only if the parties' inability to reach an agreement threatens to impede the success of the debtor's reorganization. If the parties are unable to agree, a decision on the rejection of the collective-bargaining agreement may become necessary to the reorganization process. At such a point, action by the Bankruptcy Court is required, while the policies of the NLRA have been adequately served since reasonable efforts to reach agreement have been made. That court need not determine that the parties have bargained to impasse or make any other determination outside the field of its expertise. See *infra*, at 533–534.

Since the policy of Chapter 11 is to permit successful rehabilitation of debtors, rejection should not be permitted without a finding that that policy would be served by such action. The Bankruptcy Court must make a reasoned finding on the record why it has determined that rejection should be permitted. Determining what would constitute a successful rehabilitation involves balancing the interests of the affected parties—the debtor, creditors, and employees. The Bankruptcy Court must consider the likelihood and consequences of liquidation for the debtor absent rejection, the reduced value of the creditors' claims that would follow from affirmance and the hardship that would impose on them, and the impact of rejection on the employees. In striking the balance, the Bankruptcy Court must consider not only the degree of hardship faced by each party, but also any qualitative differences between the types of hardship each may face.

The Bankruptcy Court is a court of equity, and in making this determination it is in a very real sense balancing the equities, as the Court of Appeals suggested. Nevertheless, the Bankruptcy Court must focus on the ultimate goal of Chapter 11 when considering these equities. The Bankruptcy Code does not authorize freewheeling consideration of every conceivable equity, but rather only how the equities relate to the success of the reorganization. The Bankruptcy Court's inquiry is of necessity speculative, and it must have great latitude to consider any type of evidence relevant to this issue.

III

The second issue raised by these cases is whether the NLRB can find a debtor-in-possession guilty of an unfair labor practice for unilaterally rejecting or modifying a collective-bargaining agreement before formal rejection by the Bankruptcy Court. Much effort has been expended by the parties on the question of whether the debtor is more properly characterized as an "alter ego" or a "successor employer" of the prebankruptcy debtor, as those terms have been used in our labor decisions. See *Howard Johnson Co.* v. *Hotel Employees, supra,* at 259, n. 5; *NLRB* v. *Burns International Security Services, Inc., supra; Southport Petroleum Co.* v. *NLRB,* 315 U. S. 100, 106 (1942). We see no profit in an exhaustive effort to identify which, if either, of these terms represents the closest analogy to the debtor-in-possession. Obviously if the latter were a wholly "new entity," it would be unnecessary for the Bankruptcy Code to allow it to reject executory contracts, since it would not be bound by such contracts in the first place. For our purposes, it is sensible to view the debtor-in-possession as the same "entity" which existed before the filing of the bankruptcy petition, but empowered by virtue of the Bankruptcy Code to deal with its contracts and property in a manner it could not have employed absent the bankruptcy filing.

The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources. See H. R. Rep. No. 95–595, p. 220 (1977). In some cases reorganization may succeed only if new creditors infuse the ailing firm with additional capital. We recognized the desirability of an analogous infusion of capital in *Burns, supra,* at 288; a similarly beneficial recapitalization could be jeopardized if the debtor-in-possession were saddled automatically with the debtor's prior collective-bargaining agreement. Thus, the authority to reject an executory contract is vital to the basic purpose of a Chapter 11 reorganization, because rejection can release the debtor's estate from burdensome obligations that can impede a successful reorganization.

While all parties to these cases ultimately concede that the Bankruptcy Court may authorize rejection of a collective-bargaining agreement, the Board and the Union nonetheless insist that a debtor-in-possession violates § 8(a)(5) and § 8(d) of the NLRA if it unilaterally changes the terms of the collective-bargaining agreement between the date of filing the bankruptcy petition and the date on which the Bankruptcy Court authorizes rejection of the agreement.[9] But acceptance of such a contention would largely, if not completely, undermine whatever benefit the debtor-in-possession otherwise obtains by its authority to request rejection of the agreement. In a Chapter 11 reorganization, a debtor-in-possession has until a reorganization plan is confirmed to decide whether to accept or reject an executory contract, although a creditor may request the Bankruptcy Court to make such a determination within a particular time. 11 U. S. C. § 365(d)(2) (1982 ed.). In contrast, during a Chapter 7 liquidation the trustee has only 60 days from the order for relief in which to decide whether to accept or reject an executory contract. § 365(d)(1). It seems to us that this difference between the two types of proceedings reflects the considered judgment of Congress that a debtor-in-possession seeking to reorganize should be granted more latitude in deciding whether to reject a contract than should a trustee in liquidation.

Under the Bankruptcy Code a proof of claim must be presented to the Bankruptcy Court for administration, or be lost when a plan of reorganization is confirmed. See 11 U. S. C. §§ 501, 502, and 1141 (1982 ed.).[10] Actions on claims that have been or could have been brought before the filing of a bankruptcy petition are, with limited exceptions not relevant here, stayed through the automatic stay provisions of the Bankruptcy Code. 11 U. S. C. § 362(a) (1982 ed.). The Bankruptcy Code specifies that the rejection of an executory contract which had not been assumed constitutes a breach of the contract which relates back to the date immediately preceding the filing of a petition in bankruptcy. 11 U. S. C. § 365(g)(1) (1982 ed.).[11] Consequently, claims arising after filing, such as result from the rejection of an executory contract, must also be presented through the normal administration process by which claims are estimated and classified. See 11 U. S. C. § 502(g) (1982 ed.); *In re R. Hoe & Co.*, 508 F. 2d 1126, 1132 (CA2 1974); *Workman* v. *Harrison*, 282 F. 2d 693, 699 (CA10 1960). Thus suit may not be brought against the debtor-in-possession under the collective-bargaining agreement; recovery may be had only through administration of the claim in bankruptcy.[12]

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[9] The dissent states that the Board's interpretation of the NLRA should be given deference. *Post*, at 542–543. While the Board's interpretation of the NLRA should be given some deference, the proposition that the Board's interpretation of statutes outside its expertise is likewise to be deferred to is novel. We see no need to defer to the Board's interpretation of Congress' intent in passing the Bankruptcy Code.

[10] The Bankruptcy Code's provisions regarding the presentation of claims are permissive. See 11 U. S. C. § 501 (1982 ed.). Nevertheless, the filing of a proof of claim is a necessary condition to the allowance of an unsecured or priority claim, since a plan of reorganization is binding upon all creditors once the plan is confirmed, whether or not the claim was presented for administration. 11 U. S. C. § 1141(d)(1)(A)(i) (1982 ed.). See

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In re Francis, 15 B. R. 998, 5 C. B. C. 2d 1101 (Bkrtcy. Ct. EDNY 1981); 3 L. King, R. Babitt, A. Herzog, & R. Levin, Collier on Bankruptcy ¶ 501.01 (15th ed. 1983). Undisputed claims listed by the debtor-in-possession under 11 U. S. C. § 521(1) (1982 ed.) are deemed filed for purposes of administration. See 11 U. S. C. § 1111(a) (1982 ed.).

[11] Title 11 U. S. C. § 365(g)(1) (1982 ed.) provides:

"(g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease—

"(1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, or 13 of this title, immediately before the date of the filing of the petition . . . ."

[12] Section 502(c) provides that any contingent or unliquidated claim shall be estimated for purposes of settling a bankrupt estate. Under this provision losses occasioned by the rejection of a collective-bargaining agreement must be estimated, including unliquidated losses attributable to fringe benefits or security provisions like seniority rights. Section 502(c) is a change from prior law; under § 57d of the Bankruptcy Act the court could disallow unliquidated claims if too difficult to estimate. See 3 Collier on

While the Board insists that § 365(g)(1) deals only with priorities of payment, the implications from the decided cases are that the relation back of contract rejection to the filing of the petition in bankruptcy involves more than just priority of claims.[13] Damages on the contract that result from the rejection of an executory contract, as noted, must be administered through bankruptcy and receive the priority provided general unsecured creditors. See 11 U. S. C. §§ 502(g), 507 (1982 ed.). If the debtor-in-possession elects to continue to receive benefits from the other party to an executory contract pending a decision to reject or assume the contract, the debtor-in-possession is obligated to pay for the reasonable value of those services, *Philadelphia Co.* v. *Dipple*, 312 U. S. 168, 174 (1941), which, depending on the circumstances of a particular contract, may be what is specified in the contract, see *In re Public Ledger*, 161 F. 2d 762, 770–771 (CA3 1947). See also *In re Mammoth Mart, Inc.*, 536 F. 2d 950, 954–955 (CA1 1976). Should the debtor-in-possession elect to assume the executory contract, however, it assumes the contract *cum onere*, *In re Italian Cook Oil Corp.*, 190

Bankruptcy, *supra*, ¶ 502.03. In enacting the Bankruptcy Code Congress also extended the priority for unsecured claims made by workers to cover vacation, severance, sick leave pay, and pension plan obligations and increased the amount of this priority. 11 U. S. C. § 507(a)(3) (1982 ed.); see H. R. Rep. No. 95–595, p. 357 (1977). These provisions indicate Congress' considered judgment regarding the extent to which special provisions should be afforded workers under the Bankruptcy Code for claims arising out of the rejection of the collective-bargaining agreement. In addition, wages paid after the filing of a petition in bankruptcy may be deemed administrative expenses and afforded the highest priority, if necessary to preserve the estate. See 11 U. S. C. § 503(b)(1)(A) (1982 ed.).

[13] See, *e. g.*, *In re Mammoth Mart, Inc.*, 536 F. 2d 950, 954–955 (CA1 1976); *In re Italian Cook Oil Corp.*, 190 F. 2d 994, 996 (CA3 1951); *In re United Cigar Stores Co.*, 89 F. 2d 3, 6 (CA2 1937); *Durand* v. *NLRB*, 296 F. Supp. 1049, 1056 (WD Ark. 1969); *In re Public Ledger*, 161 F. 2d 762, 770–771 (CA3 1947); *In re North Atlantic & Gulf S.S. Co.*, 204 F. Supp. 899, 909 (SDNY 1962), aff'd, 320 F. 2d 628 (CA2 1963); *In re Price Chopper Supermarkets, Inc.*, 19 B. R. 462, 466–467 (Bkrtcy. Ct. SD Cal. 1982).

F. 2d 994, 996 (CA3 1951), and the expenses and liabilities incurred may be treated as administrative expenses, which are afforded the highest priority on the debtor's estate, 11 U. S. C. § 503(b)(1)(A) (1982 ed.).

The necessary result of the foregoing discussion is that the Board is precluded from, in effect, enforcing the terms of the collective-bargaining agreement by filing unfair labor practice charges against the debtor-in-possession for violating § 8(d) of the NLRA. Though the Board's action is nominally one to enforce § 8(d) of that Act, the practical effect of the enforcement action would be to require adherence to the terms of the collective-bargaining agreement. But the filing of the petition in bankruptcy means that the collective-bargaining agreement is no longer immediately enforceable, and may never be enforceable again. Consequently, Board enforcement of a claimed violation of § 8(d) under these circumstances would run directly counter to the express provisions of the Bankruptcy Code and to the Code's overall effort to give a debtor-in-possession some flexibility and breathing space. See H. R. Rep. No. 95–595, p. 340 (1977). We conclude that from the filing of a petition in bankruptcy until formal acceptance, the collective-bargaining agreement is not an enforceable contract within the meaning of NLRA § 8(d). Cf. *Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U. S. 157, 187 (1971); *Charles Dowd Box Co.* v. *Courtney*, 368 U. S. 502, 510–513 (1962).

The Union, but not the Board, also insists that the debtor-in-possession must comply with the midterm contract modification procedures set forth in § 8(d) of the NLRA, 29 U. S. C. § 158(d). See n. 5, *supra.* Because the collective-bargaining agreement is not an enforceable contract within the meaning of § 8(d), it follows that the debtor-in-possession need not comply with the provisions of § 8(d) prior to seeking the Bankruptcy Court's permission to reject the agreement.

Section 8(d) applies when contractual obligations are repudiated by the unilateral actions of a party to the collective-bargaining agreement. We have recognized that Congress' central purpose in enacting § 8(d) was to regulate the modification of collective-bargaining agreements and to facilitate agreement in place of economic warfare. *Chemical Workers* v. *Pittsburgh Plate Glass Co.*, *supra*, at 187; see also H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 34 (1947). In a Chapter 11 case, however, the "modification" in the agreement has been accomplished not by the employer's unilateral action, but rather by operation of law. Since the filing of a petition in bankruptcy under Chapter 11 makes the contract unenforceable, § 8(d) procedures have no application to the employer's unilateral rejection of an already unenforceable contract. Indeed, even the Board concedes that the cumbersome and rigid procedures of § 8(d) need not be imported into bankruptcy proceedings. Brief for NLRB 41.

The Union maintains, as a fall-back position, that even if § 8(d) procedures do not apply fully, the debtor-in-possession should be required to "bargain to impasse" prior to seeking rejection from the Bankruptcy Court. We interpret this contention to mean that the debtor-in-possession should not be permitted to seek rejection unless the duty to bargain has been excused because further negotiations would be fruitless, a standard little different from that imposed on all employers subject to the NLRA. See *NLRB* v. *American National Insurance Co.*, 343 U. S. 395, 404 (1952); *Taft Broadcasting Co.*, 163 N. L. R. B. 475, 478 (1967), enf'd, 129 U. S. App. D. C. 399, 395 F. 2d 622 (1968). Our rejection of the need for full compliance with § 8(d) procedures of necessity means that any corresponding duty to bargain to impasse under § 8(a)(5) and § 8(d) before seeking rejection must also be subordinated to the exigencies of bankruptcy.[14] Whether impasse has been reached generally is a judgment call for the Board to make; imposing such a requirement as a condition precedent to rejection of the labor contract will simply divert the Bankruptcy Court from its customary area of expertise into a field in which it presumably has little or none.

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[14] Section 8(d) defines the duty to bargain created by § 8(a)(5) to include a duty to continue the terms of a collective-bargaining agreement in "full force" while following § 8(d) procedures for modifying a collective-bargaining agreement. Our determination that § 8(d) cannot be used to enforce the terms of a labor contract after the filing of a petition in bankruptcy and prior to formal rejection necessarily means that § 8(a)(5) cannot be used to achieve the same end. The Court's decision in *NLRB* v. *Katz*,

Our determination that a debtor-in-possession does not commit an unfair labor practice by failing to comply with § 8(d) prior to formal rejection of the collective-bargaining agreement does not undermine the policy of the NLRA, for that policy, as we have noted, is to protect the process of labor negotiations, not to impose particular results on the parties. See *H. K. Porter Co.* v. *NLRB*, 397 U. S. 99, 105 (1970); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45 (1937). Nevertheless, it is important to note that the debtor-in-possession is not relieved of all obligations under the NLRA simply by filing a petition for bankruptcy. A debtor-in-possession is an "employer" within the terms of the NLRA, 29 U. S. C. §§ 152(1) and (2), and is obligated to bargain collectively with the employees' certified representative over the terms of a new contract pending rejection of the existing contract or following formal approval of rejection by the Bankruptcy Court. See *NLRB* v. *Burns International Security Services, Inc.*, 406 U. S., at 281. But while a debtor-in-possession remains obligated to bargain in good faith under NLRA § 8(a)(5) over the terms and conditions of a possible new contract, it is not guilty of an unfair labor practice by unilaterally breaching a collective-bargaining agreement before formal Bankruptcy Court action.

Accordingly, the judgment of the Court of Appeals is

Affirmed.

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369 U. S. 736 (1962), that an employer's unilateral modification of terms and conditions of employment during the pendency of negotiations constitutes an unfair labor practice, contrary to the dissent's suggestion, *post*, at 547, n. 15, is not on point, since *Katz* did not address the effect of the bankruptcy laws on an employer's duty to bargain under § 8(a)(5).

JUSTICE BRENNAN, with whom JUSTICE WHITE, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, concurring in part and dissenting in part.

The Court holds that under § 365 of the Bankruptcy Code[1] a Bankruptcy Court should permit a debtor in possession[2] to reject a collective-bargaining agreement upon a showing that the agreement "burdens the estate, and that after careful scrutiny, the equities balance in favor of rejecting the labor contract." *Ante*, at 526. This test properly accommodates the policies of the National Labor Relations Act (NLRA) and the Bankruptcy Code, and I therefore join Parts I and II of the Court's opinion. But I cannot agree with the Court's holding in Part III that a debtor in possession does not commit an unfair labor practice if he unilaterally alters the terms of an existing collective-bargaining agreement after a bankruptcy petition has been filed, but before a Bankruptcy Court has authorized the rejection of that agreement. *Ante*, at 532. In so holding, the Court has completely ignored important policies that underlie the NLRA, as well as Parts I and II of its own opinion.

I

Two sections of the NLRA govern the alteration of existing collective-bargaining agreements. Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees . . . ."[3] Section 8(d) defines the § 8(a)(5) duty to "bargain collectively" as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment."[4] When a collective-bargaining agreement is "in

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[1] Section 365 provides in pertinent part: "Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U. S. C. § 365(a) (1982 ed.).

[2] Under § 1101 of the Bankruptcy Code, 11 U. S. C. § 1101 (1982 ed.), the debtor in possession is the debtor in any case in which "no person has qualified and is serving as a trustee." 1 A. Herzog & L. King, Bankruptcy Code § 1101, p. 452 (1983). Section 1107 provides that "[s]ubject to . . . such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights . . . and powers" of a reorganization trustee other than the right to compensation. These powers include "the power to operate the debtor's business unless the court orders other-

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wise." 5 L. King, C. Cyr, K. Klee, H. Minkel, & W. Taggart, Collier on Bankruptcy ¶ 1101.01, p. 1101-2 (15th ed. 1983).

[3] The complete text of § 8(a)(5) reads as follows:

"It shall be an unfair labor practice for an employer—

. . . . .

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title." 29 U. S. C. § 158(a).

[4] The complete text of the relevant portion of § 8(d) provides:

"For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

"(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

"(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

"(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the effect," § 8(d) adds four additional requirements to the duty to bargain collectively: "no party to [a collective-bargaining contract] shall terminate or modify such contract unless" he (1) provides the other party to the contract with timely written notice of the proposed modification, (2) "offers to meet and confer with the other party," (3) provides timely notice to the Federal Mediation and Conciliation Service and any similar state agencies, and (4) "continues in full force and effect . . . all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later."[5] Because § 8(d) defines the duty to bargain collectively that is imposed by § 8(a)(5), an employer who terminates or modifies a collective-bargaining agreement without complying with the requirements of § 8(d) violates § 8(a)(5). See *NLRB* v. *Lion Oil Co.*, 352 U. S. 282, 285 (1957) (employer who violates § 8(d)(4) violates § 8(a)(5)).[6] A unilateral modification

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dispute occurred, provided no agreement has been reached by that time; and

"(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

"The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) of this subsection . . . shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer." 29 U. S. C. § 158(d).

[5] See n. 4, *supra*, for the complete text of this portion of § 8(d).

[6] Because § 8(d) begins by defining the collective bargaining as the "obligation . . . to meet . . . and confer . . . with respect to *wages, hours and other terms and conditions of employment*" (emphasis added), we held that

of an existing collective-bargaining agreement is, therefore, a violation of § 8(d) and § 8(a)(5). See *Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U. S. 157, 159, 185 (1971); *Lion Oil*, *supra*, at 285.

In this litigation, the National Labor Relations Board (Board) held that Bildisco had violated § 8(a)(5) of the NLRA by unilaterally altering the terms of its collective-bargaining agreement with Local 408 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America.[7] Specifically, the Board found that Bildisco violated the terms of that agreement by its failure to (1) increase wages, (2) make pension, health, and welfare contributions, (3) remit dues to the union that were withheld from employees' wages, and (4) pay vacation benefits. Some of these activities occurred after Bildisco filed a voluntary petition in bankruptcy under Chapter 11 of the Bankruptcy Code, 11 U. S. C. § 1101 *et seq.* (1982 ed.), but before the Bankruptcy Court authorized Bildisco to reject its agreement with Local 408. During this period, Bildisco was operating its business as a debtor in possession. This aspect of the cases, therefore, presents the question whether a debtor in possession violates § 8(d) and, as a result, § 8(a)(5) if he unilaterally modifies the terms of a collective-bargaining agreement in the interim between the filing of a bankruptcy petition and the rejection of that agreement.

II

The Court today rejects the Board's finding that Bildisco's unilateral modifications of its collective-bargaining agree-

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notice and waiting period requirements of § 8(d) are applicable to a modification only when it "changes a term that is a mandatory rather than a permissive subject of bargaining." *Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U. S. 157, 185 (1971).

[7] The Board also held that Bildisco had violated § 8(a)(1). However, because this holding is wholly dependent on the § 8(a)(5) violation, it presents no independent issues. See *Chemical Workers*, *supra*, at 163, n. 6. See generally R. Gorman, Basic Text on Labor Law 132 (1976) (conduct that violated § 8(5) also violated § 8(1) derivatively).

ment violated § 8(a)(5). The Court supports this conclusion by asserting that enforcement of § 8(d) in the postfiling period "would run directly counter to the express provisions of the Bankruptcy Code." *Ante*, at 532. Yet, the Court points to no provision of that Code that purports to render § 8(d) inapplicable, and to no provision of the NLRA that would preclude the application of § 8(d). Indeed, the Court concedes that a debtor in possession generally must comply with the provisions of the NLRA. *Ante*, at 534.

Accordingly, in order to achieve its desired result, the Court is forced to infer from the Bankruptcy Code's general treatment of executory contracts, and from the policies that underlie that treatment, that Congress must have intended the filing of a bankruptcy petition to render § 8(d) inapplicable. *Ante*, at 529–532. The Court observes that during the postpetition period, the nondebtor party to an executory contract may not sue the debtor in possession to enforce the contract terms, *ante*, at 530, but rather can only recover the reasonable value of any benefits conferred on the estate. *Ante*, at 531.[8] By contrast, "[t]hough the Board's action is

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[8] The Court appears to attribute the rule that the debtor in possession is liable only for the reasonable value of benefits conferred, and not for the debtor's obligations under the contract, to 11 U. S. C. § 365(g)(1) (1982 ed.). Section 365(g)(1) does not, however, serve that function.

In pertinent part, § 365(g)(1) provides that "the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease . . . if such lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, or 13 of this title, immediately before the date of the filing of the petition." None of the cases relied upon by the Court, however, refer to § 365(g)(1) or its predecessor under the Bankruptcy Act as the source of the limitation of the estate's liability to the reasonable value of benefits conferred. In only one case, *In re North Atlantic & Gulf S.S. Co.*, 204 F. Supp. 899, 909 (SDNY 1962), aff'd, 320 F. 2d 628 (CA2 1963), does the court even arguably relate the principles of retroactivity to the unenforceability of contracts in the interim period. Moreover, the legislative history of § 365(g)(1) makes it clear that the purpose of that provision is to insure that claims stemming from rejection are treated as general unsecured claims. The House and Senate Reports explain that nominally one to enforce § 8(d) . . . the practical effect of the enforcement action would be to require adherence to the terms of the collective-bargaining agreement." *Ante*, at 532. Because the Court finds that suspending the enforceability of executory contracts serves the goals of providing the debtor in possession with "flexibility and breathing space," the Court concludes that Congress could not have intended § 8(d) to remain applicable once a bankruptcy petition has been filed.

This argument is unpersuasive. However correct the Court may be in its description of the manner in which the Bankruptcy Code treats executory contracts generally and the policies that underlie that treatment, there is an unavoid-

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"[t]he purpose [of § 365(g)(1)] is to treat rejection claims as prepetition claims." S. Rep. No. 95-989, p. 60 (1978); H. R. Rep. No. 95-595, p. 349 (1977). See also 2 L. King, K. Klee, R. Levin, H. Miller, & P. Murphy, Collier on Bankruptcy ¶ 365.08, p. 365-41 (15th ed. 1983). The extent to which the claim arising from rejection will be allowed is therefore determined by the rules for the allowance of prepetition claims. See 11 U. S. C. § 502(g) (1982 ed.); 3 L. King, R. Babitt, A. Herzog, & R. Levin, Collier on Bankruptcy ¶ 502.08, p. 502-100 (15th ed. 1983). In addition, the priority, if any, to be accorded such a claim will be determined according to the rules for prepetition claims. 11 U. S. C. § 507 (1982 ed.). Were damages stemming from rejection treated as postpetition, rather than prepetition, claims, they would be accorded first priority as administrative expenses. Bordewieck & Countryman, The Rejection of Collective Bargaining Agreements by Chapter 11 Debtors, 57 Am. Bankr. L. J. 293, 331 (1983); 2 Collier on Bankruptcy, *supra*, ¶ 365.08, at 365-41.

Although the statutory basis for the rule that the debtor in possession is not liable for the debtor's obligations under the contract until it is assumed is not entirely clear, the leading treatise appears to attribute the rule to the concept that title to an executory contract does not pass to the estate until the contract is assumed. *Id.*, ¶ 365.03, at 365-24. See also Bordewieck & Countryman, *supra*, at 303. The debtor in possession's liability for the reasonable value of any benefits conferred stems from § 503(b), which allows administrative expenses for the "actual, necessary costs and expenses of preserving the estate." 3 Collier on Bankruptcy, *supra*, ¶ 503.04, at 503-15.

able conflict between the Code and the NLRA with which the Court has simply failed to grapple. Permitting a debtor in possession unilaterally to alter a collective-bargaining agreement in order to further the goals of the Bankruptcy Code seriously undermines the goals of the NLRA. We thus have the duty to decide the issue before us in a way that accommodates the policies of *both* federal statutes. That cannot properly be done, in the Court's fashion, by concentrating on the Bankruptcy Code alone; under that approach, a holding that § 8(d) is inapplicable once a bankruptcy petition has been filed must obviously follow. One could as easily, and with as little justification, focus on the policies and provisions of the NLRA alone and conclude that Congress must have intended that § 8(d) remain applicable. Rather, it is necessary to examine the policies and provisions of both statutes to answer the question presented to the Court.

The Court's concentration on the Bankruptcy Code and its refusal to accommodate that statute with the NLRA is particularly incongruous since the analysis in Part II of its opinion rests almost exclusively on the recognition that the two statutes must be accommodated. In that Part, the Court concludes that "because of the special nature of a collective-bargaining contract . . . a somewhat stricter standard should govern the decision of the Bankruptcy Court to allow rejection of a collective-bargaining agreement." *Ante*, at 524. Surely, the "special nature of a collective-bargaining contract" must also be considered when determining whether Congress intended a debtor in possession to be able unilaterally to alter its terms. I can only conclude that the Court does not do so because an examination of the policies and provisions of both statutes inexorably leads to the conclusion that Congress did not intend the filing of a bankruptcy petition to affect the applicability of § 8(d), and that, as a result, a debtor in possession commits an unfair labor practice when he unilaterally alters the terms of an existing collective-bargaining agreement after a bankruptcy petition has been filed but prior to rejection of that agreement.[9]

III

A

Because the issue in this litigation centers on the effect of filing a bankruptcy petition on the obligations of a debtor in possession under NLRA § 8(d), it is appropriate to begin by examining whether that provision would apply even in the absence of the countervailing provisions and policies of the Bankruptcy Code. In undertaking this threshold analysis, we must remember that we have previously recognized that § 8(d) must be construed flexibly to effectuate the purposes of the NLRA. See, *e. g., NLRB* v. *Lion Oil Co.*, 352 U. S., at 290; *Mastro Plastics Corp.* v. *NLRB*, 350 U. S. 270 (1956). As we stated in *Lion Oil*, a construction that does not serve the goals of the statute "is to be avoided unless the words Congress has chosen clearly compel it." 352 U. S., at 289.

In addition, in resolving this threshold question we must be mindful of the deference to the Board's construction of the NLRA required by our decisions. See, *e. g., NLRB* v. *Iron*

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[9] Despite this conclusion, I agree with the Court that the debtor in possession need not comply with the notice requirements and waiting periods imposed by § 8(d) before seeking rejection. That is, in order to obtain rejection, the debtor in possession need not, for example, demonstrate that he has given notice to the union of his desire to seek rejection and has maintained the contract in "full force and effect" without resorting to a lockout for the period required by § 8(d). I also agree that the debtor in possession need not bargain to impasse before he may seek the court's permission to reject the agreement. As the Board notes, debtors in possession may need expeditious determinations about whether they may reject a collective-bargaining agreement. The notice and waiting periods contained in § 8(d) would make a rapid determination impossible. Brief for NLRB 41. Nor, as the Court notes, should the Bankruptcy Court be required to make determinations that are wholly outside its area of expertise, such as whether the parties have bargained to impasse. *Ante*, at 526–527, 533–534. Rather, I believe that the test for determining whether rejection should be permitted enunciated in Part II of the Court's opinion strikes the proper balance between the NLRA and the Bankruptcy Code.

Workers, 434 U. S. 335, 350 (1978); *NLRB* v. *J. Weingarten, Inc.*, 420 U. S. 251, 267 (1975); *NLRB* v. *Erie Resistor Corp.*, 373 U. S. 221, 236 (1963). It is the Board's position that filing a bankruptcy petition does not affect the applicability of § 8(d).[10] See, *e. g.*, *ISG Extrusion Toolings, Inc.*, 262 N. L. R. B. 114 (1982) (debtor in possession violates § 8(d) by unilaterally altering terms of collective-bargaining agreement); *Airport Limousine Service, Inc.*, 231 N. L. R. B. 932 (1977) (receiver violates § 8(d)). Plainly, the Court's position that § 8(d) is inapplicable once a bankruptcy petition has been filed is contrary to the goals of the NLRA, and a careful examination of "the words Congress has chosen" reveals that they do not "clearly compel" this result.

By their terms, the notice and cooling-off requirements of § 8(d) apply when "there is in effect a collective-bargaining contract" and a "party to such contract" seeks to "terminate or modify" it. The Court of Appeals held that § 8(d) was inapplicable because the "debtor-in-possession is '[a] new entity . . . created with its own rights and duties, subject to the supervision of the bankruptcy court.'" *In re Bildisco*, 682 F. 2d 72, 82 (CA3 1982), quoting *Shopmen's Local Union No. 455* v. *Kevin Steel Products, Inc.*, 519 F. 2d 698, 704 (CA2 1975). As a result, the Court of Appeals concluded that the debtor in possession is not a "party" to a collective-bargaining agreement within the meaning of § 8(d).[11]

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[10] The Board has held that a trustee was not bound by a pre-existing collective-bargaining agreement when there were drastic changes in the operations of the debtor company immediately after the bankruptcy petition was filed. *Blazer Industries, Inc.*, 236 N. L. R. B. 103, 109–110 (1978). Because these cases involve a debtor in possession, rather than a trustee, and because there is nothing in the opinion of the Court of Appeals for the Third Circuit or the Board suggesting that drastic changes of the significance found in *Blazer* took place in Bildisco's operation, *Blazer* is simply not relevant to the issues before us today.

[11] In concluding that a debtor in possession does not commit an unfair labor practice if he unilaterally alters the terms of the collective-bargaining agreement, the Court of Appeals also relied on an analogy to the doctrine

The Court today properly rejects the "new entity" theory, conceding that the debtor in possession is a party within the meaning of § 8(d). *Ante*, at 528. The Court nevertheless reaches an equally unsupportable result by concluding that once a bankruptcy petition has been filed, "the collective-

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of successorship, as applied by this Court in *NLRB* v. *Burns International Security Services, Inc.*, 406 U. S. 272 (1972). In my view, this reliance was misplaced.

In *Burns*, we considered the bargaining obligations of a "successor" employer. The respondent in *Burns*, Burns International Security Services, Inc., won a contract to provide security services that had been provided by Wackenhut Corp. A majority of the individuals hired by Burns were former Wackenhut employees. We held that Burns was not bound by the terms of the collective-bargaining agreement between Wackenhut and its employees, but that Burns had a duty to bargain with the union that had represented those employees. Our conclusion that Burns was not bound by Wackenhut's collective-bargaining agreement was based largely on the ground that Congress did not intend to bind an employer to terms to which it had not agreed. This consideration has little relevance to this litigation because the debtor in possession is the same employer who agreed to the collective-bargaining agreement. We also noted in *Burns* that a potential employer might be reluctant to take over a failing business if he were bound by his predecessor's labor contract. Given that the debtor is bound by the collective-bargaining agreement before he files his bankruptcy petition, holding that he remains bound after the petition is filed cannot act as a disincentive to filing the petition.

The Court of Appeals also found § 8(d) inapplicable because rejection relates back to the time immediately before the filing under § 365(g)(1). As a result, that court concluded that "no labor contract effectively existed between the union and the debtor-in-possession" after the petition was filed. 682 F. 2d, at 84. As noted above, however, see n. 8, *supra*, § 365(g)(1) is merely intended to insure that claims for damages stemming from the rejection of a collective-bargaining agreement are treated as prepetition unsecured claims. Although the fiction of relation back under § 365(g)(1) serves a useful function under the Bankruptcy Code, extending this fiction to the NLRA is not helpful in finding the proper accommodation between those two statutes. As should be apparent from the discussion in the text, see *infra*, at 545–546, for purposes of § 8(d), it is inaccurate to suggest that the collective-bargaining agreement does not exist after the bankruptcy petition is filed.

bargaining agreement is not an enforceable contract within the meaning of NLRA § 8(d)." *Ante*, at 532. Of course, the phrase "enforceable contract" does not appear in § 8(d), so the Court's point must be that the collective-bargaining agreement is not "in effect" within the meaning of that section. Surely, the plain language of the statute does not compel this result. Perhaps the Court's omission of any specific reference to this phrase indicates that it agrees that the language is not dispositive. In any event, it is simply incorrect to suggest that the collective-bargaining agreement does not retain sufficient vitality after a bankruptcy petition has been filed to be reasonably termed "in effect" within the meaning of the statute.

Although enforcement of the contract is suspended during the interim period, the contract clearly has other characteristics that render it "in effect" during the interim period. For example, if the debtor in possession assumes the contract, that assumption relates back to the time that the bankruptcy petition was filed. 2 L. King, K. Klee, R. Levin, H. Miller, & P. Murphy, Collier on Bankruptcy ¶ 365.03, p. 365–24 (15th ed. 1983). As a result, "[a]ny compensation earned by and payable to the employee under the contract" after the petition is filed is a first priority administrative expense. Countryman, Executory Contracts in Bankruptcy: Part II, 58 Minn. L. Rev. 479, 484 (1974). See also Fogel, Executory Contracts and Unexpired Leases in The Bankruptcy Code, 64 Minn. L. Rev. 341, 376 (1980). If the contract is eventually rejected, rejection constitutes a breach effective immediately before the date of the filing of the petition. 11 U. S. C. § 365(g) (1982 ed.). The employees will have general unsecured claims for damages resulting from that breach. 3 L. King, R. Babitt, A. Herzog, & R. Levin, Collier on Bankruptcy, ¶ 502.07, p. 502–99 (15th ed. 1983); Note, The Bankruptcy Law's Effect on Collective Bargaining Agreements, 81 Colum. L. Rev. 391 (1981). Some of these damages will stem from the employer's obligations under the contract in the postfiling period. Therefore, whether the contract is accepted or rejected, it will support a claim that arises out of the debtor's obligations in the post-petition period.[12]

Additionally, even under the Court's approach, see *ante*, at 531, during the interim between filing and rejection or assumption, the estate will be liable to the employees for the reasonable value of any services they perform. The contract rate frequently will be the measure of the reasonable value of those services. See, *e. g.*, *In re Chase Commissary*, 11 F. Supp. 288 (SDNY 1935) (rental in lease presumed to be reasonable value of use and occupancy); Fogel, *supra*, at 370 (generally courts presume lease rentals reasonable). For these reasons, it is inaccurate to say that the collective-bargaining agreement may not reasonably be considered "in effect" for purposes of NLRA § 8(d).[13] Other provisions of the NLRA, as well as the policies underlying that statute, require that such a contract be considered "in effect."[14]

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[12] In the unlikely event that the contract is neither accepted nor rejected, it will "ride through" the bankruptcy proceeding and be binding on the debtor even after a discharge is granted. *Federal's, Inc.* v. *Edmonton Investment Co.*, 555 F. 2d 577, 579 (CA6 1977); 2 Collier on Bankruptcy, ¶ 365.03, p. 365–22. The nondebtor party's claim will therefore survive the bankruptcy proceeding. Countryman, Executory Contracts in Bankruptcy: Part II, 58 Minn. L. Rev. 479, 487 (1974).

[13] It is noteworthy that courts considering bankruptcy cases often refer to executory contracts as remaining "in effect" unless or until they are rejected. See, *e. g.*, *Federal's, Inc.* v. *Edmonton Investment Co.*, *supra*, at 579 (executory contracts "remain in effect unless" rejected during the proceedings); *Consolidated Gas Electric Light & Power Co.* v. *United Railways Co.*, 85 F. 2d 799, 805 (CA4 1936) (executory contract "remains in force . . . until it is rejected"); *Smith* v. *Hill*, 317 F. 2d 539, 542, n. 6 (CA9 1963) (executory contracts "continu[e] in effect" unless rejected); *In re Guardian Equipment Corp.*, 18 B. R. 864, 867 (Bkrtcy. Ct. SD Fla. 1982) (lease that has not been assumed or rejected "remains in effect").

[14] Even if we could say that the collective-bargaining agreement is not "in effect" and that the notice and waiting period requirements of § 8(d) are inapplicable, it does not necessarily follow that the debtor in possession

The definitional sections of the NLRA plainly support the conclusion that Congress did not intend the filing of a bankruptcy petition to affect the applicability of § 8(d). As the Court notes, a debtor in possession is an "employer" within the meaning of the NLRA. *Ante*, at 534.[15] Because § 8(a)(5) imposes the duty to bargain on employers, the Court properly concludes that § 8(a)(5) applies to debtors in possession. *Ibid.* And because the definition of the duty to bargain includes the notice and "cooling-off" requirements of § 8(d), *Lion Oil*, 352 U. S., at 285, the logical inference is that Congress intended these restrictions of unilateral alterations to apply to debtors in possession as well. It is most unlikely that Congress intended that the obligation to bargain apply to debtors in possession but not the definition of that duty.

B

The policies underlying the NLRA in general, and § 8(d) in particular, also strongly support the application of the notice and cooling-off requirements of § 8(d) in this context. As we explained in *First National Maintenance Corp.* v. *NLRB*,

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may unilaterally alter terms and conditions of employment. For example, in *NLRB* v. *Katz*, 369 U. S. 736, 743 (1962), although the parties had not yet concluded their negotiations for an initial collective-bargaining agreement, we held that "an employer's unilateral change in conditions of employment under negotiation is . . . a violation of § 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal [to negotiate]." In addition, it has been widely held that an employer generally may not make unilateral changes in matters that are mandatory subjects of bargaining even after a collective-bargaining agreement has expired. See, *e. g., Peerless Roofing Co.* v. *NLRB*, 641 F. 2d 734, 735 (CA9 1981); *Clear Pine Mouldings, Inc.* v. *NLRB*, 632 F. 2d 721, 729 (CA9 1980); *Hinson* v. *NLRB*, 428 F. 2d 133, 136 (CA8 1970).

[15] Section 2(2), 29 U. S. C. § 152(2), defines the term "employer" to include "any person acting as an agent of an employer, directly or indirectly." A trustee or a debtor in possession is a "person" within the meaning of § 2(2) as § 2(1) of the NLRA, 29 U. S. C. § 152(1), defines "person" to include "trustees in cases under Title 11 [which governs bankruptcy], or receivers."

452 U. S. 666 (1981): "A fundamental aim of the National Labor Relations Act is the establishment and maintenance of industrial peace to preserve the flow of interstate commerce. Central to achievement of this purpose is the promotion of collective bargaining as a method of defusing and chaneling conflict between labor and management." *Id.*, at 674 (citation omitted). See also NLRA § 1, 29 U. S. C. § 151. Because of the central role played by collective bargaining in achieving the goals of the NLRA, "[e]nforcement of the obligation to bargain collectively is crucial to the statutory scheme." *NLRB* v. *American National Insurance Co.*, 343 U. S. 395, 402 (1952). The notice and cooling-off requirements of § 8(d), which are components of the duty to bargain, are specifically designed to prevent labor strife resulting from unilateral modifications and terminations of collective-bargaining agreements. In *Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U. S. 157 (1971), we explained: "The purpose of the proscription of unilateral mid-term modifications and terminations in 8(d) cannot be, therefore, simply to assure adherence to contract terms. . . . The conditions for a modification or termination set out in paragraphs (1) through (4) plainly are designed to regulate modifications and terminations so as to facilitate agreement in place of economic warfare. . . . [T]he provision 'seeks to bring about the termination and modification of collective-bargaining agreements without interrupting the flow of commerce or the production of goods.'" *Id.*, at 187, quoting *Mastro Plastics*, 350 U. S., at 284.

Plainly, the need to prevent "economic warfare" resulting from unilateral changes in terms and conditions of employment is as great after a bankruptcy petition has been filed as it is prior to that time. I do not think that there is any question that the threat to labor peace stemming from a unilateral modification of a collective-bargaining agreement is as great one day after a bankruptcy petition is filed as it was one day before the petition was filed.[16] We cannot ignore these realities when construing the reach of the NLRA. Cf. *NLRB* v. *Erie Resistor Corp.*, 373 U. S., at 236 (citing Board's function in applying the "general provisions of the Act to the complexities of industrial life" as a reason to defer to its judgment). Nor can we ignore the judgment of the Board that § 8(d) should remain applicable after a bankruptcy petition has been filed, because that judgment stems from the Board's "special understanding of 'the actualities of industrial relations,'" *ibid.*, quoting *NLRB* v. *Steelworkers*, 357 U. S. 357, 362–363 (1958).

The basis for § 8(d)'s prohibition against unilateral modifications is a congressional judgment that such modifications would be antithetical to labor peace. As we explained in a somewhat different context in *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U. S. 203, 211 (1964), "[t]he Act was framed with an awareness that refusals to confer and negotiate had been one of the most prolific causes of industrial strife." Permitting unilateral modifications of collective-bargaining agreements, therefore, seriously undermines policies that lie at the very heart of § 8(d) and the NLRA. In sum, were one to consider only the policies and provisions of the NLRA, there could be no question that Congress intended that § 8(d) remain applicable after a bankruptcy petition has been filed.

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[16] Recent events make it clear that the fear of labor unrest resulting from postfiling unilateral modifications is not merely a hypothetical possibility. For example, on September 24, 1983, Continental Airlines filed a Chapter 11 petition. The company immediately instituted wage reductions that ranged from 45 to 50%. N. Y. Times, Sept. 28, 1983, p. D6. On October 3, Continental's pilots and flight attendants went on strike. N. Y. Times, Oct. 3, 1983, p. B13. Similarly, on April 22, 1983, Wilson Foods Corp. filed a Chapter 11 petition. Three days later, the company reduced wages by 40 to 50%. N. Y. Times, May 3, 1983, p. D2. The wage cut prompted a strike in early June. N. Y. Times, June 11, 1983, p. 31.

C

When we turn to the relevant provisions and policies of the Bankruptcy Code, we find nothing that alters this conclusion. As I have said, *supra*, at 539, the Court is unable to point to any provision of the Bankruptcy Code that by its terms renders § 8(d) inapplicable. Nor does the Court argue that there is anything in the Code that would forbid the debtor in possession to comply with the requirements of § 8(d).[17] The question then is whether application of § 8(d) would so undermine the goals of the Bankruptcy Code that, despite the deleterious effect on the policies of the NLRA, Congress could not have intended that § 8(d) remain applicable once a bankruptcy petition has been filed.

As the Court correctly points out, the primary goal of Chapter 11 is to enable a debtor to restructure his business so as to be able to continue operating. *Ante*, at 528. Unquestionably, the option to reject an executory contract is essential to this goal. But the option to violate a collective-bargaining agreement before it is rejected is scarcely vital to insuring successful reorganization. For if a contract is so burdensome that even temporary adherence will seriously jeopardize the reorganization, the debtor in possession may seek the Bankruptcy Court's permission to reject that contract. Under the test announced by the Court today, his request should be granted.[18] Indeed, because labor unrest is inimical to the prospects for a successful reorganization, and because unilateral modifications of a collective-bargaining agreement will often lead to labor strife, such unilateral modifications may more likely *decrease* the prospects for a successful reorganization.

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[17] The Court does suggest that § 502(c), which provides for the estimation of contingent and unliquidated claims, and § 507(a)(3), which grants third-priority status to certain claims for compensation earned prior to the filing of the petition, "indicate Congress' considered judgment regarding the extent to which special provisions should be afforded workers under the Bankruptcy Code." *Ante*, at 531, n. 12. If, as I conclude, Congress intended § 8(d) to remain applicable after a bankruptcy petition is filed, it would, however, have been unnecessary to repeat the protections contained by that section in the Bankruptcy Code.

In addition, the Court refers to, and appears to find significance in, the automatic stay provision, 11 U. S. C. § 362(a) (1982 ed.), and the requirement that damages stemming from rejection of an executory contract be recovered through the Code's claims administration procedures. *Ante*, at 529–530. However, since the Court does not argue that the automatic stay provision would bar an NLRB proceeding to enforce § 8(d) or that any award in such proceedings would not be recovered through the bankruptcy claims administration procedures, I fail to see why the Court finds these sections relevant to our resolution of the issue before us.

The Court claims that requiring the debtor in possession to adhere to the terms of a collective-bargaining agreement conflicts with the "Code's overall effort to give a debtor-in-possession some flexibility and breathing space." *Ante*, at 532. Again the Court does not explain how enforcement of § 8(d) interferes with these policies; but I assume that the Court expects that the financial pressures created by requiring adherence to the collective-bargaining agreement would put pressure on the debtor in possession to reach a rapid and possibly premature judgment about whether to assume or reject a contract.[19] It is apparent, however, that Congress did not believe that providing the debtor in possession with unlimited time to consider his options should outweigh all other considerations. For example, although Chapter 11 permits a debtor in possession to accept or reject a contract "at any time before the confirmation of a plan," the nondebtor party to such a contract is permitted to request that the court order the debtor in possession to assume or reject the contract within a specified period. 11 U. S. C. § 365(d)(2) (1982 ed.). Congress thus clearly concluded that, in certain circumstances, the rights of the nondebtor party would outweigh the need of the debtor in possession for unlimited flexibility and breathing space.

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[18] I therefore fundamentally disagree with the Court's wholly unsupported statement that application of § 8(d) "would largely, if not completely, undermine whatever benefit the debtor-in-possession otherwise obtains by its authority to request rejection of the agreement." *Ante*, at 529.

[19] This financial pressure is created primarily by the fact that the cost of the debtor in possession's compliance with § 8(d) would be accorded first priority as an administrative expense. See *In re Bel Air Chateau Hospital, Inc.*, 106 LRRM 2834 (CD Cal. 1980) (Board award for backpay accruing during reorganization given first priority as a cost of administration); Bordewieck & Countryman, 57 Am. Bankr. L. J., at 333. Cf. *Reading Co.* v. *Brown*, 391 U. S. 471 (1968) (damages resulting from negligence of receiver administering an estate under Chapter XI of the Bankruptcy Act afforded first priority as an administrative expense).

More importantly, I do not believe that the pressure to seek early rejection will frequently impede the reorganization process. As noted above, when a collective-bargaining agreement will seriously impede the reorganization, the debtor in possession should be able to obtain permission to reject the agreement. The major danger to the reorganization that stems from premature rejection of collective-bargaining agreements is that the debtor in possession will reject an agreement he would not have rejected upon further deliberation. If that agreement contains terms more favorable than any that he is later able to obtain through renegotiation the reorganization may be impaired. In the case of a collective-bargaining agreement, however, this danger is largely illusory. Because the union members will lose their jobs if the reorganization fails, it is highly likely that the debtor in possession will be able to negotiate a contract that is at least as favorable as the contract that he has rejected. Cf. *First National Maintenance Corp.* v. *NLRB*, 452 U. S., at 681, n. 19 (noting instances in which unions have aided employers to save failing businesses); N. Y. Times, Oct. 9, 1983, section 3, pp. 1, 12 (reporting instances of employees agreeing to wage reductions in response to threatened bankruptcy or plant closings). In addition, because unions have a strong incentive to avoid rejection of contracts, they frequently may be willing to enter into negotiated settlements for the interim period that will at least forestall rejection. Consequently, in many cases, requiring the debtor in possession to adhere to the terms of an existing agreement will not lead to early rejection at all. In sum, because the debtor in possession may apply to the bankruptcy court for rejection of executory contracts, holding § 8(d) applicable to the reorganization period will not seriously undermine the chances for a successful reorganization.

IV

My conclusion that Congress intended that a debtor in possession adhere to the terms of a collective-bargaining agreement in the postpetition period, when he is free to disregard all other contracts, is supported by our consistent recognition that collective-bargaining agreements are not like other agreements. What Justice Douglas wrote in 1960 remains true today:

> "The collective bargaining agreement . . . is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . .
>
> "A collective bargaining agreement is an effort to erect a system of industrial self-government. When most parties enter into contractual relationship, they do so voluntarily, in the sense that there is no real compulsion to deal with one another, as opposed to dealing with other parties. This is not true of the labor agreement. The choice is generally not between entering or refusing to enter into a relationship, for that in all probability preexists the negotiations. Rather, it is between having that relationship governed by an agreed-upon rule of law or leaving each and every matter subject to a temporary resolution dependent solely upon the relative strength, at any given moment, of the contending forces." *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 578–580 (citations and footnotes omitted).

See also *John Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543, 550 (1964).

The Court's holding that an employer, without committing an unfair labor practice, may disregard the terms of a collective-bargaining agreement after a bankruptcy petition has been filed deprives the parties to the agreement of their "system of industrial self-government." Without this system, resolution of the parties' disputes will indeed be left to "the relative strength . . . of the contending forces." *Steelworkers*, *supra*, at 580. Of course, there is some tension between the policies underlying the Bankruptcy Code and a holding that § 8(d) remains applicable after a bankruptcy petition has been filed. Holding § 8(d) inapplicable in these circumstances, however, strikes at the very heart of the policies underlying that section and the NLRA, and will, I believe, spawn precisely the type of industrial strife that § 8(d) was designed to avoid. By contrast, I do not think that the prospects for a successful reorganization will be seriously impaired by holding that § 8(d) continues to apply. For this reason, I conclude that filing a bankruptcy petition does not affect the applicability of § 8(d), and that, as a result, a debtor in possession who unilaterally alters the terms of a collective-bargaining agreement commits an unfair labor practice.

GROVE CITY COLLEGE ET AL. *v.* BELL, SECRETARY OF EDUCATION, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 82-792. Argued November 29, 1983—Decided February 28, 1984

Section 901(a) of Title IX of the Education Amendments of 1972 prohibits sex discrimination in "any education program or activity receiving Federal financial assistance," and § 902 provides that a recipient's compliance with regulations of a federal agency awarding assistance may be secured by termination of assistance "to the particular program, or part thereof, in which . . . noncompliance has been . . . found." Under the statute a federally assisted program must be identified before Title IX coverage is triggered. Petitioner Grove City College (College), a private, coeducational, liberal arts college, accepts no direct federal assistance, nor does it participate in the Regular Disbursement System (RDS) of the Department of Education (Department), whereby amounts for federal grants to students are advanced to the institution, which then itself selects eligible students and calculates and distributes the grants. However, the College enrolls students who receive direct federal Basic Educational Opportunity Grants (BEOG's) under the Department's Alternative Disbursement System (ADS). The Department concluded that, under applicable regulations, the College was a "recipient" of "Federal financial assistance," and when the College refused to execute an Assurance of Compliance with Title IX's nondiscrimination provisions, as required by the regulations, the Department initiated administrative proceedings, which resulted in an order terminating assistance until the College executed an Assurance of Compliance and satisfied the Department that it was in compliance with the regulations. The College and four of its students then filed suit in Federal District Court, which held that the students' BEOG's constituted "Federal financial assistance" to the College but that the Department could not terminate the students' aid because of the College's refusal to execute an Assurance of Compliance. The Court of Appeals reversed, holding that the Department could terminate the students' BEOG's to force the College to execute an Assurance of Compliance.

Held:

1. Title IX coverage is triggered because some of the College's students receive BEOG's to pay for their education. In view of the structure of the Education Amendments of 1972, the clear statutory lan-

guage, the legislative history (including postenactment history) showing Congress' awareness that the student assistant programs established by the Amendments significantly aided colleges and universities, and the longstanding administrative construction of the phrase "receiving Federal financial assistance" as including assistance to a student who uses it at a particular institution, Title IX coverage is not foreclosed merely because federal funds are granted to the students rather than to the College's educational programs. Pp. 563–570.

2. However, the receipt of BEOG's by some of the College's students does not trigger institutionwide coverage under Title IX. In purpose and effect, BEOG's represent financial assistance to the College's own financial aid program, and it is that program that may properly be regulated under Title IX's nondiscrimination provision. Under the program-specific limitations of §§ 901 and 902, the College's choice of participating in the ADS rather than the RDS mechanism for administering the BEOG program neither expands nor contracts the breadth of the "program or activity receiving Federal financial assistance." The fact that federal funds eventually reach the College's general operating budget cannot subject it to institutionwide coverage. Pp. 570–574.

3. A refusal to execute a proper program-specific Assurance of Compliance warrants the Department's termination of federal assistance to the student financial aid program. The College's contention that termination must be preceded by a finding of actual discrimination is not supported by § 902's language. Pp. 574–575.

4. Requiring the College to comply with Title IX's prohibition of discrimination as a condition for its continued eligibility to participate in the BEOG program infringes no First Amendment rights of the College or its students. Pp. 575–576.

687 F. 2d 684, affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined, and in all but Part III of which BRENNAN, MARSHALL, and STEVENS, JJ., joined. POWELL, J., filed a concurring opinion, in which BURGER, C. J., and O'CONNOR, J., joined, *post*, p. 576. STEVENS, J., filed an opinion concurring in part and concurring in the result, *post*, p. 579. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL, J., joined, *post*, p. 581.

David M. Lascell argued the cause for petitioners. With him on the briefs was *Robb M. Jones*.

Acting Solicitor General Bator argued the cause for respondents. With him on the briefs were *Solicitor General*

Lee, Assistant Attorney General Reynolds, Deputy Assistant Attorney General Cooper, John H. Garvey, and *Brian K. Landsberg.**

JUSTICE WHITE delivered the opinion of the Court.

Section 901(a) of Title IX of the Education Amendments of 1972, Pub. L. 92–318, 86 Stat. 373, 20 U. S. C. § 1681(a), prohibits sex discrimination in "any education program or activity receiving Federal financial assistance,"[1] and § 902 directs agencies awarding most types of assistance to promulgate regulations to ensure that recipients adhere to that prohibition. Compliance with departmental regulations may be secured by termination of assistance "to the particular program, or part thereof, in which . . . noncompliance has been . . . found" or by "any other means authorized by law." § 902, 20 U. S. C. § 1682.[2]

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*Briefs of *amici curiae* urging reversal were filed for the Equal Employment Advisory Council by *Robert E. Williams, Douglas S. McDowell,* and *Edward E. Potter;* for Hillsdale College by *Robert W. Barker;* and for the Pacific Legal Foundation by *Ronald A. Zumbrun* and *John H. Findley.*

Briefs of *amici curiae* urging affirmance were filed for the American Association of University Women et al. by *Nancy Duff Campbell* and *Margaret A. Kohn;* for the Council of Collegiate Women Athletic Administrators by *Lionel S. Sobel;* for the Lawyers' Committee for Civil Rights Under Law by *Richard C. Dinkelspiel, Norman Redlich, William L. Robinson, Norman J. Chachkin,* and *Roger L. Waldman;* and for the Mexican American Legal Defense and Educational Fund et al. by *Robert H. Kapp, Joseph M. Hassett, John C. Keeney, Jr., Joaquin Avila,* and *Morris J. Baller.*

Briefs of *amici curiae* were filed for the Mountain States Legal Foundation et al. by *Maxwell A. Miller;* for Wabash College by *David N. Shane;* and for Representative Claudine C. Schneider et al. by *Karen Syma Shinberg Czapanskiy.*

[1] Section 901(a), 20 U. S. C. § 1681(a), provides, in pertinent part:

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."

Nine statutory exemptions, none of which is relevant to the disposition of this case, follow. See §§ 901(a)(1)–(9), 20 U. S. C. §§ 1681(a)(1)–(9).

This case presents several questions concerning the scope and operation of these provisions and the regulations established by the Department of Education. We must decide, first, whether Title IX applies at all to Grove City College, which accepts no direct assistance but enrolls students who receive federal grants that must be used for educational purposes. If so, we must identify the "education program or activity" at Grove City that is "receiving Federal financial assistance" and determine whether federal assistance to that program may be terminated solely because the College violates the Department's regulations by refusing to execute an Assurance of Compliance with Title IX. Finally, we must consider whether the application of Title IX to Grove City infringes the First Amendment rights of the College or its students.

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[2] Section 902, 20 U. S. C. § 1682, provides:

"Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section [901] with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report" (emphasis in original).

I

Petitioner Grove City College is a private, coeducational, liberal arts college that has sought to preserve its institutional autonomy by consistently refusing state and federal financial assistance. Grove City's desire to avoid federal oversight has led it to decline to participate, not only in direct institutional aid programs, but also in federal student assistance programs under which the College would be required to assess students' eligibility and to determine the amounts of loans, work-study funds, or grants they should receive.[3] Grove City has, however, enrolled a large number of students who receive Basic Educational Opportunity Grants (BEOG's), 20 U. S. C. § 1070a (1982 ed.), under the Department of Education's[4] Alternate Disbursement System (ADS).[5]

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[3] See, *e. g.*, 20 U. S. C. § 1071 *et seq.* (1982 ed.); 34 CFR pt. 674 (1983) (National Direct Student Loans); 42 U. S. C. § 2751 *et seq.* (1976 ed. and Supp. V); 34 CFR pt. 675 (1983) (College Work Study Program); 20 U. S. C. § 1070b (1982 ed.); 34 CFR pt. 676 (1983) (Supplemental Educational Opportunity Grants).

[4] The Department of Health, Education, and Welfare's functions with respect to BEOG's were transferred to the Department of Education by § 301(a)(3) of the Department of Education Organization Act, Pub. L. 96–88, 93 Stat. 678, 20 U. S. C. § 3441(a)(3) (1982 ed.). We will refer to both HEW and DOE as "the Department."

[5] The Secretary, in his discretion, has established two procedures for computing and disbursing BEOG's. Under the Regular Disbursement System (RDS), the Secretary estimates the amount that an institution will need for grants and advances that sum to the institution, which itself selects eligible students, calculates awards, and distributes the grants by either crediting students' accounts or issuing checks. 34 CFR §§ 690.71–690.85 (1983). Most institutions whose students receive BEOG's participate in the RDS, but the ADS is an option made available by the Secretary

The Department concluded that Grove City was a "recipient" of "Federal financial assistance" as those terms are defined in the regulations implementing Title IX, 34 CFR §§ 106.2(g)(1), (h) (1982),[6] and, in July 1977, it requested that the College execute the Assurance of Compliance required by 34 CFR § 106.4 (1983). If Grove City had signed the Assurance, it would have agreed to

> "[c]omply, to the extent applicable to it, with Title IX . . . and all applicable requirements imposed by or pursuant to the Department's regulation . . . to the end that . . . no person in the United States shall, on the basis of sex, be . . . subjected to discrimination under any education program or activity for which [it] receives or bene-

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to schools that wish to minimize their involvement in the administration of the BEOG program. Institutions participating in the program through the ADS must make appropriate certifications to the Secretary, but the Secretary calculates awards and makes disbursements directly to eligible students. 34 CFR §§ 690.91–690.96 (1983).

[6] The Title IX regulations were recodified in 1980, without substantive change, at 34 CFR pt. 106 in connection with the establishment of the Department of Education. 45 Fed. Reg. 30802, 30962–30963 (1980). All references herein are to the currently effective regulations.

"Federal financial assistance" is defined in 34 CFR § 106.2(g)(1) (1983) to include:

"A grant or loan of Federal financial assistance, including funds made available for:

. . . . .

"(ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity."

A "recipient" is defined in 34 CFR § 106.2(h) (1983) to include:

"[A]ny public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance . . . ."

See also 34 CFR §§ 106.11, 106.31(a) (1983).

> fits from Federal financial assistance from the Department." App. to Pet. for Cert. A-126—A-127.[7]

When Grove City persisted in refusing to execute an Assurance, the Department initiated proceedings to declare the College and its students ineligible to receive BEOG's.[8] The Administrative Law Judge held that the federal financial assistance received by Grove City obligated it to execute an Assurance of Compliance and entered an order terminating assistance until Grove City "corrects its noncompliance with Title IX and satisfies the Department that it is in compliance" with the applicable regulations. App. to Pet. for Cert. A-97.

Grove City and four of its students then commenced this action in the District Court for the Western District of Pennsylvania, which concluded that the students' BEOG's constituted "Federal financial assistance" to Grove City but held, on several grounds, that the Department could not terminate the students' aid because of the College's refusal to execute an Assurance of Compliance. *Grove City College* v. *Harris*, 500 F. Supp. 253 (1980).[9] The Court of Appeals reversed.

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[7] The Assurance of Compliance form currently in use differs somewhat from the version quoted in the text. See App. to Brief for Federal Respondents in *Hillsdale College* v. *Department of Education*, O. T. 1982, No. 82-1538, pp. 1a-2a. The substance, however, is the same in that it refers to "education programs and activities receiving Federal financial assistance."

[8] The Department also sought to terminate Guaranteed Student Loans (GSL's), 20 U. S. C. § 1071 (1982 ed.), received by Grove City's students.

[9] The District Court held, first, that GSL's were "contract[s] of insurance or guaranty" that could not be terminated under § 902 of Title IX. The Department did not challenge this conclusion on appeal, and we express no view on this aspect of the District Court's reasoning. The court also concluded that Grove City could not be required to execute an Assurance of Compliance because Subpart E of the Title IX regulations, which prohibits discrimination in employment, was invalid. As the Court of Appeals recognized, we have since upheld the validity of Subpart E. *North Haven Board of Education* v. *Bell*, 456 U. S. 512 (1982). The Dis-

687 F. 2d 684 (CA3 1982). It first examined the language and legislative history of Title IX and held that indirect, as well as direct, aid triggered coverage under § 901(a) and that institutions whose students financed their educations with BEOG's were recipients of federal financial assistance within the meaning of Title IX. Although it recognized that Title IX's provisions are program-specific, the court likened the assistance flowing to Grove City through its students to nonearmarked aid, and, with one judge dissenting, declared that "[w]here the federal government furnishes indirect or non-earmarked aid to an institution, it is apparent to us that the institution itself must be the 'program.'" 687 F. 2d, at 700.[10] Finally, the Court of Appeals concluded that the Department could condition financial aid upon the execution of an Assurance of Compliance and that the Department had acted properly in terminating federal financial assistance to the students and Grove City despite the lack of evidence of actual discrimination.

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trict Court held, in the alternative, that § 902 permitted termination only upon an actual finding of sex discrimination and that Grove City's refusal to execute an Assurance could not justify a termination of assistance. Finally, the court reasoned that affected students were entitled to hearings before their aid could be discontinued.

[10] In reaching this conclusion, the Court of Appeals accepted the position argued by respondents. As respondents acknowledged in the oral argument before this Court, the Department's position has not been a model of clarity. Tr. of Oral Arg. 33–35. The Department initially took the position that the receipt of student financial aid would trigger institutionwide coverage under Title IX and construed its regulations to that effect. It pressed that position in the lower courts. In their brief in opposition to the petition for certiorari, respondents did not defend this aspect of the Court of Appeals' opinion, but argued instead that the question need not be resolved to decide this case. In their brief on the merits and in the oral argument, however, respondents conceded that the Court of Appeals erred in holding that Grove City itself constituted the "program or activity" subject to regulation under Title IX. The Department's regulations, it was represented, may be construed in a program-specific manner and hence are not inconsistent with the statute. This concession, of course, is not binding on us and does not foreclose our review of the judgment below.

We granted certiorari, 459 U. S. 1199 (1983), and we now affirm the Court of Appeals' judgment that the Department could terminate BEOG's received by Grove City's students to force the College to execute an Assurance of Compliance.

II

In defending its refusal to execute the Assurance of Compliance required by the Department's regulations, Grove City first contends that neither it nor any "education program or activity" of the College receives any federal financial assistance within the meaning of Title IX by virtue of the fact that some of its students receive BEOG's and use them to pay for their education. We disagree.

Grove City provides a well-rounded liberal arts education and a variety of educational programs and student services. The question is whether any of those programs or activities "receiv[es] Federal financial assistance" within the meaning of Title IX when students finance their education with BEOG's. The structure of the Education Amendments of 1972, in which Congress both created the BEOG program and imposed Title IX's nondiscrimination requirement, strongly suggests an affirmative conclusion. BEOG's were aptly characterized as a "centerpiece of the bill," 118 Cong. Rec. 20297 (1972) (Rep. Pucinski), and Title IX "relate[d] directly to [its] central purpose." 117 Cong. Rec. 30412 (1971) (Sen. Bayh). In view of this connection and Congress' express recognition of discrimination in the administration of student financial aid programs,[11] it would indeed be anomalous to discover that one of the primary components of Congress' comprehensive "package of federal aid," *id.*, at 2007 (Sen. Pell), was not intended to trigger coverage under Title IX.

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[11] See, *e. g.*, Discrimination Against Women: Hearings on Section 805 of H. R. 16098 before the Special Subcommittee on Education of the House Committee on Education and Labor, 91st Cong., 2d Sess., 235 (1970) (Rep. May); *id.*, at 433 (Rep. Mink); *id.*, at 739 (Rep. Griffiths); 118 Cong. Rec. 3935–3940, 5803–5809 (1972) (Sen. Bayh).

It is not surprising to find, therefore, that the language of § 901(a) contains no hint that Congress perceived a substantive difference between direct institutional assistance and aid received by a school through its students. The linchpin of Grove City's argument that none of its programs receives any federal assistance is a perceived distinction between direct and indirect aid, a distinction that finds no support in the text of § 901(a).[12] Nothing in § 901(a) suggests that Congress elevated form over substance by making the application of the nondiscrimination principle dependent on the manner in which a program or activity receives federal assistance. There is no basis in the statute for the view that only institutions that themselves apply for federal aid or receive checks directly from the Federal Government are subject to regulation. Cf. *Bob Jones University* v. *Johnson*, 396 F. Supp. 597, 601–604 (SC 1974), affirmance order, 529 F. 2d 514 (CA4 1975). As the Court of Appeals observed, "by its all inclusive terminology [§ 901(a)] appears to encompass *all* forms of federal aid to education, direct or indirect." 687 F. 2d, at 691 (emphasis in original). We have recognized the need to "'accord [Title IX] a sweep as broad as its language,'" *North Haven Board of Education* v. *Bell*, 456 U. S. 512, 521 (1982) (quoting *United States* v. *Price*, 383 U. S. 787, 801 (1966)), and we are reluctant to read into § 901(a) a limitation not apparent on its face.

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[12] Grove City itself recognizes the problematic nature of the distinction it advances. Although its interpretation of § 901(a) logically would exclude from coverage under Title IX local school districts that receive federal funds through state educational agencies, see, *e. g.*, 20 U. S. C. § 3801 *et seq.* (1982 ed.), Grove City wisely does not attempt to defend this result. In fact, the College concedes that "[b]ecause federal assistance is often passed through state agencies, this type of indirect assistance leads to Title IX jurisdiction *over the education program or activity* which ultimately receives the assistance." Brief for Petitioners 17, n. 17 (emphasis in original). Grove City has proposed no principled basis for treating differently federal assistance received through students and federal aid that is disbursed by a state agency.

Our reluctance grows when we pause to consider the available evidence of Congress' intent. The economic effect of direct and indirect assistance often is indistinguishable, see *Mueller* v. *Allen*, 463 U. S. 388, 397, n. 6 (1983); *id.*, at 412 (MARSHALL, J., dissenting); *Committee for Public Education* v. *Nyquist*, 413 U. S. 756, 783 (1973); *Norwood* v. *Harrison*, 413 U. S. 455, 463–465 (1973), and the BEOG program was structured to ensure that it effectively supplements the College's own financial aid program.[13] Congress undoubtedly comprehended this reality in enacting the Education Amendments of 1972. The legislative history of the Amendments is replete with statements evincing Congress' awareness that the student assistance programs established by the

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[13] Grove City's students receive BEOG's to pay for the education they receive at the College. Their eligibility for assistance is conditioned upon continued enrollment at Grove City and on satisfactory progress in their studies. 20 U. S. C. §§ 1091(a)(1), (3) (1982 ed.). Their grants are based on the "cost of attendance" at Grove City, 20 U. S. C. § 1070a(a)(2)(B)(i) (1982 ed.), which includes the College's tuition and fees, room and board, and a limited amount for books, supplies, and miscellaneous expenses. 34 CFR § 690.51 (1983). The amount that students and their families can reasonably be expected to contribute is subtracted from the maximum BEOG to ensure that the assistance is used solely for educational expenses, 20 U. S. C. § 1070a(a)(2)(A)(i) (1982 ed.), and students are required to file affidavits stating that their awards will be "used solely for expenses related to attendance" at Grove City. 20 U. S. C. § 1091(a)(5) (1982 ed.); see 34 CFR §§ 690.79, 690.94(a)(2) (1983).

Grove City's attempt to analogize BEOG's to food stamps, Social Security benefits, welfare payments, and other forms of general-purpose governmental assistance to low-income families is unavailing. First, there is no evidence that Congress intended the receipt of federal money in this manner to trigger coverage under Title IX. Second, these general assistance programs, unlike student aid programs, were not designed to assist colleges and universities. Third, educational institutions have no control over, and indeed perhaps no knowledge of, whether they ultimately receive federal funds made available to individuals under general assistance programs, but they remain free to opt out of federal student assistance programs. Fourth, individuals' eligibility for general assistance is not tied to attendance at an educational institution.

Amendments would significantly aid colleges and universities.[14] In fact, one of the stated purposes of the student aid provisions was to "provid[e] assistance to institutions of higher education." Pub. L. 92–318, § 1001(c)(1), 86 Stat. 381, 20 U. S. C. § 1070(a)(5).

Congress' awareness of the purpose and effect of its student aid programs also is reflected in the sparse legislative history of Title IX itself. Title IX was patterned after Title VI of the Civil Rights Act of 1964, Pub. L. 88–352, 78 Stat. 252, 42 U. S. C. § 2000d *et seq.* (1976 ed. and Supp. V). *Cannon* v. *University of Chicago*, 441 U. S. 677, 684–685 (1979); 118 Cong. Rec. 5807 (1972) (Sen. Bayh). The drafters of Title VI envisioned that the receipt of student aid funds would trigger coverage,[15] and, since they approved identical language, we discern no reason to believe that the Congressmen who voted for Title IX intended a different result.

The few contemporaneous statements that attempted to give content to the phrase "receiving Federal financial assistance," while admittedly somewhat ambiguous, are consistent with Senator Bayh's declaration that Title IX authorizes the termination of "all aid that comes through the Department of Health, Education, and Welfare." 117 Cong. Rec. 30408 (1971).[16] Such statements by individual legislators should not be given controlling effect, but, at least in instances where they are consistent with the plain language of Title IX, Senator Bayh's remarks are "an authoritative guide to the statute's construction." *North Haven Board of Education* v. *Bell*, 456 U. S., at 527. The contemporaneous legislative history, in short, provides no basis for believing that Title IX's broad language is somehow inconsistent with Congress' underlying intent. See also 20 U. S. C. § 1094(a)(3) (1982 ed.).

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[14] See, *e. g.*, H. R. Rep. No. 92–554, p. 244 (1972) (Supplemental Views); 117 Cong. Rec. 2007 (1971) (Sen. Pell); *id.*, at 37778, 37782 (Rep. Quie); *id.*, at 39256 (Rep. Steiger); 118 Cong. Rec. 20295 (1972) (Rep. Reid); *id.*, at 20297 (Rep. Pucinski); *id.*, at 20312 (statement of Isaac K. Beckes); *id.*, at 20310 (letter from Kingman Brewster, Jr.); *id.*, at 20324 (Rep. Mitchell).

[15] See, *e. g.*, H. R. Rep. No. 914, 88th Cong., 1st Sess., 104–105 (1963); 110 Cong. Rec. 13388 (1964) (Sen. McClellan). Appendix A to the initial Title VI regulations identified several programs making assistance available through payments to students among those to which the regulations applied, 29 Fed. Reg. 16298, 16304 (1964), as did the version in force when Title IX was enacted. 45 CFR pt. 80, Appendix A (1972). See *Bob Jones University* v. *Johnson*, 396 F. Supp. 597 (SC 1974), affirmance order, 529 F. 2d 514 (CA4 1975). The current list of programs covered by Title VI includes BEOG's and GSL's, 34 CFR pt. 100, Appendix A (1983), and Grove City's assumption that Congress would have excluded BEOG's from coverage under Title VI if the program had been operational in 1964 is baseless.

Persuasive evidence of Congress' intent concerning student financial aid may also be gleaned from its subsequent treatment of Title IX. We have twice recognized the probative value of Title IX's unique postenactment history, *North Haven Board of Education* v. *Bell*, *supra*, at 535; *Cannon* v. *University of Chicago*, *supra*, at 687, n. 7, 702–703, and we do so once again. The Department's sex discrimination regulations made clear that "[s]cholarships, loans, [and] grants . . . extended directly to . . . students for payment to" an institution constitute federal financial assistance to that entity. 40 Fed. Reg. 24137 (1975); see n. 6, *supra*. Under the statutory "laying before" procedure of the General Education Provisions Act, Pub. L. 93–380, 88 Stat. 567, as amended, 20 U. S. C. § 1232(d)(1) (1982 ed.), Congress was afforded an opportunity to invalidate aspects of the regulations it deemed inconsistent with Title IX.[17] The regulations were clear, and Secretary Weinberger left no doubt concerning the Department's position that "the furnishing of student assistance to a student who uses it at a particular institution . . . [is] Federal aid which is covered by the statute."[18] Yet, neither House passed a disapproval resolution. Congress' failure to disapprove the regulations is not dispositive, but, as we recognized in *North Haven Board of Education* v. *Bell*, *supra*, at 533–534, it strongly implies that the regulations accurately reflect congressional intent. Congress has never disavowed this implication and in fact has acted consistently with it on a number of occasions.[19]

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[16] See 117 Cong. Rec. 30158–30159 (1971) (Sen. McGovern); *id.*, at 39260 (Rep. Erlenborn); 118 Cong. Rec. 5814 (1972) (Sen. Bentsen). Grove City relies heavily on a colloquy between Senators Bayh and Dominick:

"Mr. DOMINICK. The Senator is talking about every program under HEW?

"Mr. BAYH. Let me suggest that I would imagine that any person who was sitting at the head of [HEW], administering this program, would be reasonable and would use only such leverage as was necessary against the institution.

"It is unquestionable, in my judgment, that this would not be directed at specific assistance that was being received by individual students, but would be directed at the institution, and the Secretary would be expected to use good judgment as to how much leverage to apply, and where it could best be applied." 117 Cong. Rec. 30408 (1971).

Grove City contends that Senator Bayh's statement demonstrates an intent to exclude student aid from coverage under Title IX. We believe that his answer is more plausibly interpreted as suggesting that, although the Secretary is empowered to terminate student aid, he probably would not need to do so where leverage could be exerted by terminating other assistance. The students, of course, always remain free to take their assistance elsewhere.

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[17] The statutory "laying before" procedure and the actions taken by Congress pursuant to it were more completely summarized in *North Haven Board of Education* v. *Bell*, 456 U. S., at 531–534.

[18] Sex Discrimination Regulations: Hearings before the Subcommittee on Postsecondary Education of the House Committee on Education and Labor, 94th Cong., 1st Sess., 482 (1975) (1975 Hearings). The Secretary added:

"Our view was that student assistance, assistance that the Government furnishes, that goes directly or indirectly to an institution is Government aid within the meaning of Title IX. If it is not, there is an easy remedy. Simply tell us that it is not. We believe it is and base our assumption on that." *Id.*, at 484.

[19] Although "Congress has proceeded to amend § 901 when it has disagreed with HEW's interpretation of the statute," *North Haven Board of Education* v. *Bell*, *supra*, at 534, it has acquiesced in the Department's longstanding assessment of the types of federal aid that trigger coverage under Title IX. In considering the 1976 Education Amendments, for ex-

With the benefit of clear statutory language, powerful evidence of Congress' intent, and a longstanding and coherent administrative construction of the phrase "receiving Federal financial assistance," we have little trouble concluding that Title IX coverage is not foreclosed because federal funds are

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ample, Congress rejected an amendment proposed by Senator McClure that would have defined federal financial assistance as "assistance received by the institution directly from the federal government." 122 Cong. Rec. 28144 (1976). Senator Pell objected that the amendment would remove from the scope of Title IX funds provided under the BEOG program and pointed out that, "[w]hile these dollars are paid to students they flow through and ultimately go to institutions of higher education . . . ." *Id.*, at 28145. Senator Bayh raised a similar objection, *id.*, at 28145–28146, and the amendment was rejected. *Id.*, at 28147. See also *id.*, at 28013–28016 (treatment of Hatfield amendment).

It is also significant that in 1976 Congress enacted legislation clarifying the intent of the Privacy Act to ensure that institutions serving as payment agents for the BEOG program are not considered contractors maintaining a system of records to accomplish a function of the Secretary. Pub. L. 94–328, § 2(f), 90 Stat. 727, 20 U. S. C. § 1070a(c). This legislation responded to concerns expressed by educational institutions over "the additional and unnecessary administrative burdens which would be imposed upon them if [they] were deemed 'contractors.'" S. Rep. No. 94–954, p. 3 (1976). In sharp contrast, Congress has failed to respond to repeated requests by colleges in Grove City's position for legislation exempting them from coverage under Title IX.

The statutory authorization for BEOG's, moreover, has been renewed three times. Pub. L. 94–482, § 121(a), 90 Stat. 2091; Pub. L. 95–566, § 2, 92 Stat. 2402; Pub. L. 96–374, § 402(a), 94 Stat. 1401. Each time, Congress was well aware of the administrative interpretation under which such grants were believed to trigger coverage under Title IX. The history of these reenactments makes clear that Congress regards BEOG's and other forms of student aid as a critical source of support for educational institutions. See, *e. g.*, Reauthorization of the Higher Education Act and Related Measures: Hearings before the Subcommittee on Postsecondary Education of the House Committee on Education and Labor, 96th Cong., 1st Sess., pt. 3, p. 400 (1979) (Rep. Ford). In view of Congress' consistent failure to amend either Title IX or the BEOG statute in a way that would support Grove City's argument, we feel fully justified in concluding that "the legislative intent has been correctly discerned." *North Haven Board of Education* v. *Bell*, *supra*, at 535.

granted to Grove City's students rather than directly to one of the College's educational programs. There remains the question, however, of identifying the "education program or activity" of the College that can properly be characterized as "receiving" federal assistance through grants to some of the students attending the College.[20]

III

An analysis of Title IX's language and legislative history led us to conclude in *North Haven Board of Education* v. *Bell*, 456 U. S., at 538, that "an agency's authority under Title IX both to promulgate regulations and to terminate funds is subject to the program-specific limitations of §§ 901 and 902." Although the legislative history contains isolated suggestions that entire institutions are subject to the nondiscrimination provision whenever one of their programs receives federal assistance, see 1975 Hearings 178 (Sen. Bayh), we cannot accept the Court of Appeals' conclusion that in the circumstances present here Grove City itself is a "program or activity" that may be regulated in its entirety. Nevertheless, we find no merit in Grove City's contention that a decision treating BEOG's as "Federal financial assistance" cannot be reconciled with Title IX's program-specific language since BEOG's are not tied to any specific "education program or activity."

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[20] JUSTICE STEVENS' assertion that we need not decide and have no jurisdiction to decide this question is puzzling. Title IX coverage is triggered only when an "education program or activity" is receiving federal aid. Unless such a program can be and is identified, there is no basis for ordering the College to execute an Assurance of Compliance. The Court of Appeals understood as much and ruled that the entire College is the covered educational program. Until and unless that view of the statute is overturned, there will be outstanding an authoritative Court of Appeals' judgment that the certificate Grove City must execute relates to the entire College and that without such a certificate the Department would be entitled to terminate grants to Grove City students.

Grove City asks to be relieved of that judgment on the grounds that none of its educational programs is receiving any federal aid and that if any of its programs is receiving aid, it is only its administration of the BEOG program. Grove City is entitled to have these issues addressed, for otherwise it must deal with the undisturbed judgment of the Court of Appeals that the entire College is subject to federal oversight under Title IX. Even though the Secretary has changed his position and no longer agrees with the expansive construction accorded the statute by the Court of Appeals, it is still at odds with Grove City as to the extent of the covered program; and, in any event, its modified stance can hardly overturn or modify the judgment below or eliminate Grove City's legitimate and substantial interest in having its submissions adjudicated.

If Grove City participated in the BEOG program through the RDS, we would have no doubt that the "education program or activity receiving Federal financial assistance" would not be the entire College; rather, it would be its student financial aid program.[21] RDS institutions receive federal funds directly, but can use them only to subsidize or expand their financial aid programs and to recruit students who might otherwise be unable to enroll. In short, the assistance is earmarked for the recipient's financial aid program. Only by ignoring Title IX's program-specific language could we conclude that funds received under the RDS, awarded to eligible students, and paid back to the school when tuition comes due represent federal aid to the entire institution.

We see no reason to reach a different conclusion merely because Grove City has elected to participate in the ADS. Although Grove City does not itself disburse students' awards, BEOG's clearly augment the resources that the College itself devotes to financial aid. As is true of the RDS, however, the fact that federal funds eventually reach the College's general operating budget cannot subject Grove City to institution-wide coverage. Grove City's choice of administrative mechanisms, we hold, neither expands nor contracts the breadth of the "program or activity"—the financial aid program—that receives federal assistance and that may be regulated under Title IX.

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[21] There is no merit to Grove City's argument that the Department may regulate only the administration of the BEOG program. Just as employees who "work in an education program that receive[s] federal assistance," *North Haven Board of Education* v. *Bell*, 456 U. S., at 540, are protected under Title IX even if their salaries are "not funded by federal money," *ibid.*, so also are students who participate in the College's federally assisted financial aid program but who do not themselves receive federal funds protected against discrimination on the basis of sex.

To the extent that the Court of Appeals' holding that BEOG's received by Grove City's students constitute aid to the entire institution rests on the possibility that federal funds received by one program or activity free up the College's own resources for use elsewhere, the Court of Appeals' reasoning is doubly flawed. First, there is no evidence that the federal aid received by Grove City's students results in the diversion of funds from the College's own financial aid program to other areas within the institution.[22] Second, and more important, the Court of Appeals' assumption that Title IX applies to programs receiving a larger share of a school's own limited resources as a result of federal assistance earmarked for use elsewhere within the institution is inconsistent with the program-specific nature of the statute. Most federal educational assistance has economic ripple effects throughout the aided institution, and it would be difficult, if not impossible, to determine which programs or activities derive such indirect benefits. Under the Court of Appeals' theory, an entire school would be subject to Title IX merely because one of its students received a small BEOG or because one of its departments received an earmarked federal grant. This result cannot be squared with Congress' intent.

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[22] Until 1980, institutions whose students received BEOG's and other forms of assistance were required to provide assurance that they would "continue to spend on [their] own scholarship and student-aid program[s], from sources other than funds received under [the federal programs], not less than the average expenditure per year made for that purpose during the most recent period of three fiscal years." 20 U. S. C. § 1088c. This requirement was altered in the Education Amendments of 1980, Pub. L. 96–374, § 487(a), 94 Stat. 1451, 20 U. S. C. § 1094(a)(2) (1982 ed.), and no longer applies to schools whose students receive only BEOG's.

The Court of Appeals' analogy between student financial aid received by an educational institution and nonearmarked direct grants provides a more plausible justification for its holding, but it too is faulty. Student financial aid programs, we believe, are *sui generis*. In neither purpose nor effect can BEOG's be fairly characterized as unrestricted grants that institutions may use for whatever purpose they desire. The BEOG program was designed, not merely to increase the total resources available to educational institutions, but to enable them to offer their services to students who had previously been unable to afford higher education. It is true, of course, that substantial portions of the BEOG's received by Grove City's students ultimately find their way into the College's general operating budget and are used to provide a variety of services to the students through whom the funds pass. However, we have found no persuasive evidence suggesting that Congress intended that the Department's regulatory authority follow federally aided students from classroom to classroom, building to building, or activity to activity. In addition, as Congress recognized in considering the Education Amendments of 1972, the economic effect of student aid is far different from the effect of nonearmarked grants to institutions themselves since the former, unlike the latter, increases both an institution's resources and its obligations. See Pub. L. 92-318, § 1001(a), 86 Stat. 375, 20 U. S. C. § 1070e; S. Rep. No. 92-346, p. 43 (1971); 118 Cong. Rec. 20331 (1972) (Rep. Badillo). In that sense, student financial aid more closely resembles many earmarked grants.

We conclude that the receipt of BEOG's by some of Grove City's students does not trigger institutionwide coverage under Title IX. In purpose and effect, BEOG's represent federal financial assistance to the College's own financial aid program, and it is that program that may properly be regulated under Title IX.

IV

Since Grove City operates an "education program or activity receiving Federal financial assistance," the Department may properly demand that the College execute an Assurance of Compliance with Title IX. 34 CFR § 106.4 (1983). Grove City contends, however, that the Assurance it was requested to sign was invalid, both on its face and as interpreted by the Department, in that it failed to comport with Title IX's program-specific character. Whatever merit that objection might have had at the time, it is not now a valid basis for refusing to execute an Assurance of Compliance.

The Assurance of Compliance regulation itself does not, on its face, impose institutionwide obligations. Recipients must provide assurance only that "each education program or activity operated by . . . [them] *and to which this part applies* will be operated in compliance with this part." 34 CFR § 106.4 (1983) (emphasis added). The regulations apply, by their terms, "to every recipient and to *each education program or activity* operated by such recipient *which receives or benefits from Federal financial assistance.*" 34 CFR § 106.11 (1983) (emphasis added). These regulations, like those at issue in *North Haven Board of Education* v. *Bell*, 456 U. S. 512 (1982), "conform with the limitations Congress enacted in §§ 901 and 902." *Id.*, at 539. Nor does the Department now claim that its regulations reach beyond the College's student aid program. Furthermore, the Assurance of Compliance currently in use, like the one Grove City refused to execute, does not on its face purport to reach the entire College; it certifies compliance with respect to those "education programs and activities receiving Federal financial assistance." See n. 2, *supra*. Under this opinion, consistent with the program-specific requirements of Title IX, the covered education program is the College's financial aid program.

A refusal to execute a proper program-specific Assurance of Compliance warrants termination of federal assistance to the student financial aid program. The College's contention that termination must be preceded by a finding of actual discrimination finds no support in the language of § 902, which plainly authorizes that sanction to effect "[c]ompliance with any requirement adopted pursuant to this section." Regulations authorizing termination of assistance for refusal to execute an Assurance of Compliance with Title VI had been promulgated, 45 CFR § 80.4 (Supp., Jan. 1, 1965), and upheld, *Gardner* v. *Alabama*, 385 F. 2d 804 (CA5 1967), cert. denied, 389 U. S. 1046 (1968), long before Title IX was enacted, and Congress no doubt anticipated that similar regulations would be developed to implement Title IX. 118 Cong. Rec. 5807 (1972) (Sen. Bayh). We conclude, therefore, that the Department may properly condition federal financial assistance on the recipient's assurance that it will conduct the aided program or activity in accordance with Title IX and the applicable regulations.

V

Grove City's final challenge to the Court of Appeals' decision—that conditioning federal assistance on compliance with Title IX infringes First Amendment rights of the College and its students—warrants only brief consideration. Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept. *E. g., Pennhurst State School and Hospital* v. *Halderman*, 451 U. S. 1, 17 (1981). Grove City may terminate its participation in the BEOG program and thus avoid the requirements of § 901(a). Students affected by the Department's action may either take their BEOG's elsewhere or attend Grove City without federal financial assistance. Requiring Grove City to comply with Title IX's prohibition of discrimination as a condition for its continued eligibility to participate in the BEOG program infringes no First Amendment rights of the College or its students.

Accordingly, the judgment of the Court of Appeals is

Affirmed.

JUSTICE POWELL, with whom THE CHIEF JUSTICE and JUSTICE O'CONNOR join, concurring.

As I agree that the holding in this case is dictated by the language and legislative history of Title IX, and the regulations of the Department of Education, I join the Court's decision. I do so reluctantly and write briefly to record my view that the case is an unedifying example of overzealousness on the part of the Federal Government.

Grove City College (Grove City) may be unique among colleges in our country; certainly there are few others like it. Founded more than a century ago in 1876, Grove City is an independent, coeducational liberal arts college. It describes itself as having "both a Christian world view and a freedom philosophy," perceiving these as "interrelated." App. A–22. At the time of this suit, it had about 2,200 students and tuition was surprisingly low for a private college.[1] Some 140 of the College's students were receiving Basic Educational Opportunity Grants (BEOG's),[2] and 342 had obtained Guaranteed Student Loans (GSL's).[3] The grants were made directly to the students through the Department of Education, and the student loans were guaranteed by the Federal Government. Apart from this indirect assistance, Grove City has followed an unbending policy of refusing all forms of government assistance, whether federal, state, or local. It was and is the policy of this small college to remain wholly independent of government assistance, recognizing—as this case well illustrates—that with acceptance of such assistance one surrenders a certain measure of the freedom that Americans always have cherished.

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[1] Yearly tuition for 1983 for fees, room, and board was $4,270. Brief for Petitioners 3, n. 2.

[2] *Grove City College* v. *Harris*, 500 F. Supp. 253, 259 (WD Pa. 1980).

[3] *Ibid.*

This case involves a regulation adopted by the Department to implement § 901(a) of Title IX (20 U. S. C. § 1681(a)). It is well to bear in mind what § 901(a) provides:

> "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance . . . ."

The sole purpose of the statute is to make unlawful "*discrimination*" by recipients of federal financial assistance on the "basis of sex." The undisputed fact is that Grove City does not discriminate—and so far as the record in this case shows—never has discriminated against anyone on account of sex, race, or national origin. This case has nothing whatever to do with discrimination past or present. The College therefore has complied to the letter with the sole purpose of § 901(a).

As the Court describes, the case arises pursuant to a regulation adopted under Title IX that authorizes the Secretary to obtain from recipients of federal aid an "Assurance of Compliance" with Title IX and regulations issued thereunder. At the outset of this litigation, the Department insisted that by accepting students who received BEOG awards, Grove City's entire institution was subject to regulation under Title IX. The College, in view of its policies and principles of independence and its record of nondiscrimination, objected to executing this Assurance. One would have thought that the Department, confronted as it is with cases of national importance that involve actual discrimination, would have respected the independence and admirable record of this College. But common sense and good judgment failed to prevail. The Department chose to litigate, and instituted an administrative proceeding to compel Grove City to execute an agreement to operate all of its programs and activities in full compliance with all of the regulations promulgated under Title IX—despite the College's record as an institution that had operated to date in full accordance with the letter and spirit of Title IX. The Administrative Law Judge who heard the case on September 15, 1978, did not relish his task.

On the basis of the evidence, which included the formal published statement of Grove City's strong "nondiscrimination policy," he stated:

> "It should also be noted that there was *not the slightest hint of any failure to comply with Title IX* save the refusal to submit an executed assurance of compliance with Title IX. This refusal is obviously a matter of conscience and belief." App. to Pet. for Cert. A–94 (emphasis added).[4]

The Administrative Law Judge further evidenced his reluctance by emphasizing that the regulations were "binding" upon him. *Id.*, at A–95. He concluded that the scholarship grants and student loans to Grove City constituted indirect "federal financial assistance," and in view of the failure of Grove City to execute the Assurance, the regulation required that the grants and loans to its students must be "terminated." *Id.*, at A–96. The College and four of its students then instituted this suit in 1978 challenging the validity of the regulations and seeking a declaratory judgment.

The effect of the Department's termination of the student grants and loans would not have been limited to the College itself. Indeed, the most direct effect would have been upon the students themselves. Absent the availability of other scholarship funds, many of them would have had to abandon their college education or choose another school. It was to avoid these serious consequences, that this suit was instituted. The College prevailed in the District Court but lost in the Court of Appeals. Only after Grove City had brought its case before this Court, did the Department retreat to its present position that Title IX applies only to Grove City's financial aid office. On this narrow theory, the Department has prevailed, having taken this small independent college, which it acknowledges has engaged in no discrimination whatever, through six years of litigation with the full weight of the Federal Government opposing it. I cannot believe that the Department will rejoice in its "victory."

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[4] These findings of the Administrative Law Judge have not been questioned.

JUSTICE STEVENS, concurring in part and concurring in the result.

For two reasons, I am unable to join Part III of the Court's opinion. First, it is an advisory opinion unnecessary to today's decision, and second, the advice is predicated on speculation rather than evidence.

The controverted issue in this litigation is whether Grove City College may be required to execute the "Assurance of Compliance with Title IX" tendered to it by the Secretary in order to continue receiving the benefits of the federal financial assistance provided by the BEOG program. The Court of Appeals affirmed the District Court's decision that Grove City is a "recipient" of federal financial assistance, and reversed its decision that the Secretary could not terminate federal financial assistance because Grove City refused to execute the Assurance. The Court today holds (in Part II of its opinion) that Grove City is a recipient of federal financial assistance within the meaning of Title IX, and (in Part IV) that Grove City must execute the Assurance of Compliance in order to continue receiving that assistance. These holdings are fully sufficient to sustain the judgment the Court reviews, as the Court acknowledges by affirming that judgment.

In Part III of its opinion, the Court holds that Grove City is not required to refrain from discrimination on the basis of sex except in its financial aid program. In so stating, the Court decides an issue that is not in dispute. The Assurance of Compliance merely requires that it comply with Title IX "to the extent applicable to it." See *ante*, at 560. The Secretary, who is responsible for administering Title IX, construes the statute as applicable only to Grove City's financial aid program. All the Secretary seeks is a judgment that Title IX requires Grove City to promise not to discriminate in its financial aid program. The Court correctly holds that this program is subject to the requirements of Title IX, and that Grove City must promise not to discriminate in its operation of the program. But, there is no reason for the Court to hold that Grove City need not make a promise that the Secretary does not ask it to make, and that it in fact would not be making by signing the Assurance, in order to continue to receive federal financial assistance. It will be soon enough to decide the question discussed in Part III when and if the day comes that the Secretary asks Grove City to make some further promise in order to continue to receive federal financial assistance.

Moreover, the record in this case is far from adequate to decide the question raised in Part III. See *Consolidated Rail Corp.* v. *Darrone*, *post*, at 635–636. Assuming for the moment that participation in the BEOG program could not in itself make Title IX applicable to the entire institution, a factual inquiry is nevertheless necessary as to which of Grove City's programs and activities can be said to receive or benefit from federal financial assistance. This is the import of the applicable regulation, upheld by the Court today, *ante*, at 574–575, which states that Title IX applies "to every recipient and to each education program or activity operated by such recipient which receives or benefits from Federal financial assistance." 34 CFR § 106.11 (1983). The Court overlooks the fact that the regulation is in the disjunctive; Title IX coverage does not always depend on the actual receipt of federal financial assistance by a given program or activity. The record does not tell us how important the BEOG program is to Grove City, in either absolute or relative terms; nor does it tell us anything about how the benefits of the program are allocated within the institution. The Court decides that a small scholarship for just one student should not subject the entire school to coverage. *Ante*, at 572–573. But why should this case be judged on the basis of that hypothetical example instead of a different one? What if the record showed—and I do not suggest that it does—that all of the BEOG money was reserved for, or merely happened to be used by, talented athletes and that their tuition payments were sufficient to support an entire athletic program that would otherwise be abandoned? Would such a hypothetical program be covered by Title IX?* And if this athletic program discriminated on the basis of sex, could it plausibly be contended that Congress intended that BEOG money could be used to enable such a program to survive? Until we know something about the character of the particular program, it is inappropriate to give advice about an issue that is not before us.

Accordingly, while I subscribe to the reasoning in Parts I, II, IV, and V of the Court's opinion, I am unable to join Part III.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring in part and dissenting in part.

The Court today concludes that Grove City College is "receiving Federal financial assistance" within the meaning of Title IX of the Education Amendments of 1972, 20 U. S. C.

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*Indeed, if we are to speculate about hypothetical cases, why not consider a school comparable to the private institutions discussed in *Blum* v. *Yaretsky*, 457 U. S. 991 (1982), in which over 90% of the patients received funds from public sources? See *id.*, at 1011. It is at least theoretically possible that an educational institution might be financed entirely by tuition, and that virtually all of the students at an institution could receive a federal subsidy. Again, I do not suggest that Grove City College is such an institution, but I do suggest that it is improper for the Court to decide a legal issue on the basis of hypothetical examples that are selected to support a particular result.

§ 1681(a), because a number of its students receive federal education grants. As the Court persuasively demonstrates in Part II of its opinion, that conclusion is dictated by "the need to accord [Title IX] a sweep as broad as its language," *ante*, at 564; by reference to the analogous statutory language and legislative history of Title VI of the Civil Rights Act of 1964, *ante*, at 566; by reliance on the unique postenactment history of Title IX, *ante*, at 567–568; and by recognition of the strong congressional intent that there is no "substantive difference between direct institutional assistance and aid received by a school through its students," *ante*, at 564, 565–566, 569–570, and nn. 12–14, 19. For these same reasons, however, I cannot join Part III of the Court's opinion, in which the Court interprets the language in Title IX that limits application of the statute to "any education program or activity" receiving federal moneys. By conveniently ignoring these controlling indicia of congressional intent, the Court also ignores the primary purposes for which Congress enacted Title IX. The result—allowing Title IX coverage for the College's financial aid program, but rejecting institutionwide coverage even though federal moneys benefit the entire College—may be superficially pleasing to those who are uncomfortable with federal intrusion into private educational institutions, but it has no relationship to the statutory scheme enacted by Congress.

I

The Court has twice before had occasion to ascertain the precise scope of Title IX. See *North Haven Board of Education* v. *Bell*, 456 U. S. 512 (1982); *Cannon* v. *University of Chicago*, 441 U. S. 677 (1979). In both cases, the Court emphasized the broad congressional purposes underlying enactment of the statute. In *Cannon*, while holding that Title IX confers a private cause of action on individual plaintiffs, we noted that the primary congressional purpose behind the statute was "to avoid the use of federal resources to support discriminatory practices," and that this purpose "is generally served by the statutory procedure for the termination of federal financial support for institutions engaged in discriminatory practices." *Id.*, at 704. In *North Haven*, while holding that employment discrimination is within the reach of Title IX, we expressed "no doubt that 'if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language.'" 456 U. S., at 521 (quoting *United States* v. *Price*, 383 U. S. 787, 801 (1966)). And although we acknowledged that an agency's authority "both to promulgate regulations and to terminate funds is subject to the program-specific limitation of §§ 901 and 902," 456 U. S., at 538, we explicitly refused to define "program" at that time, *id.*, at 540.

When reaching that question today,[1] the Court completely disregards the broad remedial purposes of Title IX that consistently have controlled our prior interpretations of this civil rights statute. Moreover, a careful examination of the statute's legislative history, the accepted meaning of similar statutory language in Title VI, and the postenactment history of Title IX will demonstrate that the Court's narrow definition of "program or activity" is directly contrary to congressional intent.

A

The statute that was eventually enacted as Title IX had its genesis in separate proposals considered by the House and the Senate, in 1970 and 1971, respectively. In the House, the Special Subcommittee on Education, under the leadership of Representative Edith Green, held extensive hearings during the summer of 1970 on "Discrimination Against

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[1] There is much to commend the suggestion, made by JUSTICE STEVENS, that Part III of the Court's opinion is no more than an advisory opinion, unnecessary to the resolution of this case and unsupported by any factual findings made below. See *ante*, p. 579 (concurring in part and concurring in result). Because the Court has not heeded that suggestion, however, I feel compelled to express my view on the merits of the issue decided by the Court.

Women." See Hearings on § 805 of H. R. 16098 before the Special Subcommittee on Education of the House Committee on Education and Labor, 91st Cong., 2d Sess. (1970) (1970 Hearings). At that time, the Subcommittee was considering a package of legislation that included a simple amendment adding the word "sex" to the list of discriminations prohibited by Title VI of the Civil Rights Act of 1964, 42 U. S. C. § 2000d.[2] See *North Haven*, *supra*, at 523, n. 13; *Cannon*, *supra*, at 694, n. 16. Testimony offered during those hearings, however, focused on the evidence of pervasive sex discrimination in educational institutions.[3] It therefore was not surprising that the version of the Subcommittee's proposal that was eventually passed by the full House was limited in its application to federally assisted *education* programs or activities. See 117 Cong. Rec. 39248–39261, 39353–39354 (1971). More important for present purposes, however, the House-passed bill retained the overall format of the Subcommittee proposal, and therefore continued to incorporate the "program or activity" language and its enforcement provisions from Title VI. *Id.*, at 39364–39365.

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[2] The prohibitory section of Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." For reasons explained *infra*, at 585–586, the version of Title IX that was eventually enacted by Congress is for all relevant purposes identical to this provision. See *ante*, at 557, n. 1, for the text of Title IX.

[3] Also during those hearings, representatives of the Executive Branch first raised objections about the expansive reach of the proposal being considered by the Subcommittee. Specifically, it was noted by witnesses testifying on behalf of the Department of Health, Education, and Welfare that the proposed legislation would apply to institutions that were traditionally noncoeducational and to facilities and services within an institution, such as dormitories or physical recreation areas, that might properly be limited to one sex. See, *e. g.*, 1970 Hearings, at 657 (statement of Peter Muirhead, Associate Commissioner for Higher Education). See also *id.*, at 674 (statement of Frankie M. Freeman, Commissioner, U. S. Commission on Civil Rights). To eliminate this alleged overreaching, the Department of Justice offered its own legislation that was recognized at the time as far *narrower* in its reach than the Subcommittee's proposal. Nonetheless, even with this more limited scope, the alternative offered by the administration would have prohibited sex-based discrimination by a "recipient of Federal financial assistance for any education program or activity," H. R. 5191, 92d Cong., 1st Sess., § 1001(a) (1971), and would have covered facilities or services at educational institutions that did not themselves receive direct educational grants. See, *e. g.*, 1970 Hearings, at 678 (testimony of Jerris Leonard, Assistant Attorney General, Civil Rights Division). The administration proposal was eventually rejected by the full House in favor of the bill reported by Representative Green and her Subcommittee.

In the Senate, action began on Title IX in 1971, when Senator Bayh first introduced a floor amendment to the comprehensive education legislation then being considered. Amendment No. 398 to Higher Education Act of 1971, reprinted in 117 Cong. Rec. 30156 (1971). As then written, Senator Bayh's proposal was clearly intended to cover an entire institution whenever any education program or activity conducted by that institution was receiving federal moneys. In particular, the amendment expressly prohibited discrimination on the basis of sex "under any program or activity conducted by a public institution of higher education, or any school or department of graduate education, which is a recipient of Federal financial assistance for any education program or activity." As explained by its sponsor, the amendment would have prohibited sex discrimination "by any public institution of higher education or any institution of graduate education receiving Federal educational financial assistance." *Id.*, at 30157.[4]

The 1971 amendment was eventually ruled nongermane, *id.*, at 30415, so Senator Bayh was forced to renew his efforts during the next session. When reintroduced, the amendment had been modified to conform in substantial part with the version of Title IX that had been passed by the House. See 118 Cong. Rec. 5803 (1972). This change was apparently made to ensure adoption of the antidiscrimination provisions by the Conference Committee that would soon convene. See *id.*, at 5813 (remarks of Sen. Pell, principal Senate Manager of the bill) ("As [Senator Bayh] knows, I said to him earlier that I intended to support the position he has advocated in conference with the House. He has chosen to bring the amendment before the Senate now"). There is thus nothing to suggest that the Senate had retreated from the underlying premise of the original amendment proposed by Senator Bayh in 1971—that sex discrimination would be prohibited in any educational institution receiving federal financial assistance. Indeed, Senator Bayh's willingness to conform the language of his amendment to the bill already enacted by the House proved successful, as Title IX was approved by the Conference Committee, see S. Conf. Rep. No. 92–798, pp. 221–222 (1972), and enacted into law.

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[4] See also 117 Cong. Rec. 30408 (1971) ("I doubt very much whether even one institution of higher education today, private or public, is not receiving some Federal assistance") (remarks of Sen. Bayh).

In sum, although the contemporaneous legislative history does not definitively explain the intended meaning of the program-specific language included in Title IX, it lends no support to the interpretation adopted by the Court. What is clear, moreover, is that Congress intended enforcement of Title IX to mirror the policies and procedures utilized for enforcement under Title VI.

B

"Title IX was patterned after Title VI of the Civil Rights Act of 1964." *Cannon*, 441 U. S., at 694. Except for the substitution of the word "sex" in Title IX to replace the words "race, color, or national origin" in Title VI, and for the limitation of Title IX to "education" programs or activities, the two statutes use identical language to describe their scope. The interpretation of this critical language as it already existed under Title VI is therefore crucial to an understanding of congressional intent in 1972 when Title IX was enacted using the same language.

The voluminous legislative history of Title VI is not easy to comprehend, especially when one considers the emotionally and politically charged atmosphere operating at the time of its enactment. And there are no authoritative committee reports explaining the many compromises that were eventually enacted, including the program-specific limitations that found their way into Title VI. Moreover, as might be expected, statements were made by various Members of Congress that can be cited to support a whole range of definitions for the "program or activity" language. For every instance in which a legislator equated the word "program" with a particular grant statute,[5] there is an example of a legislator defining "program or activity" more broadly.[6]

Without completely canvassing several volumes of the Congressional Record, I believe it is safe to say that, by including the programmatic language in Title VI, Congress sought to allay fears on the part of many legislators that one isolated violation of the statute's antidiscrimination provisions would result in the wholesale termination of federal funds. In particular, "Congress was primarily concerned with two facets of the termination power: the possibility that noncompliance in a single school district might lead to termination of funds to the entire state; and the possibility that discrimination in the education program might result in the termination of federal assistance to unrelated federally financed programs, such as highways." Comment, 118 U. Pa. L. Rev. 1113, 1119–1120 (1970) (footnotes omitted). See *id.*, at 1116–1124. See also 687 F. 2d 684, 697–698 (CA3 1982).

But even accepting that there is some uncertainty concerning the 1964 understanding of "program or activity," we need not be overly concerned with whatever doubt surrounds the precise intent, if any, of the 88th Congress. For what is crucial in ascertaining the meaning of the program-specific language included in Title IX is the understanding that the 92d Congress had at the time it enacted the identical language. Cf. *Cannon, supra,* at 696–698. And there were two principal indicators of the accepted interpretation of the program-specific language in Title VI that were available to Members of Congress in 1972 when Title IX was enacted—the existing administrative regulations promulgated under Title VI, and the available judicial decisions that had already interpreted those provisions.

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[5] See, *e. g.*, 110 Cong. Rec. 7100–7101 (1964) (remarks of Sen. Javits); *id.*, at 8359–8361 (remarks of Sen. Eastland); *id.*, at 13331 (remarks of Sen. Gore).

[6] See, *e. g.*, *id.*, at 7059 (1964) (remarks of Sen. Pastore); *id.*, at 7063 (remarks of Sen. Pastore); *id.*, at 7067 (remarks of Sen. Ribicoff); *id.*, at 8507–8508 (remarks of Sens. Smathers and Allott); *id.*, at 12714–12715 (remarks of Sen. Humphrey); *id.*, at 12818 (statement of Sen. Dirksen); *id.*, at 14330–14331 (remarks of Sen. Williams).

The Title VI regulations first issued by the Department of Health, Education, and Welfare during the 1960's, and remaining in effect during 1972, could not have been clearer in the way they applied to educational institutions. See generally 45 CFR pt. 80 (1972). For example, § 80.4(d) explained the assurances required from, among others, institutions of higher education that received federal financial assistance:

> "(d) *Assurances from institutions.* (1) In the case of any application for Federal financial assistance to an institution of higher education (including assistance for construction, for research, for a special training project, for a student loan program, or for any other purpose), the assurance required by this section shall extend to admission practices *and to all other practices relating to the treatment of students.*
>
> "(2) The assurance required with respect to an institution of higher education, . . . insofar as the assurance relates to the institution's practices with respect to admission or other treatment of individuals as students, . . . or to the opportunity to participate in the provision of services or other benefits to such individuals, *shall be applicable to the entire institution unless the applicant establishes, to the satisfaction of the responsible Department official, that the institution's practices in designated parts or programs of the institution will in no way affect its practices in the program of the institution for*

> *which Federal financial assistance is sought, or the beneficiaries of or participants in such program. If in any such case the assistance sought is for the construction of a facility or part of a facility, the assurance shall in any event extend to the entire facility and to facilities operated in connection therewith.*" (Emphasis added.)

A list of illustrative applications followed that further demonstrated the broad scope of these regulations. One of the illustrations was aimed particularly at institutions of higher education:

> "In a research, training, demonstration, or other grant to a university for activities to be conducted in a graduate school, discrimination in the admission and treatment of students in the graduate school is prohibited, and the prohibition extends to the entire university unless it satisfies the responsible Department official that practices with respect to other parts or programs of the university will not interfere, directly or indirectly, with fulfillment of the assurance required with respect to the graduate school." § 80.5(c).[7]

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[7] Another illustration included in the Department's Title VI regulations referred explicitly to federal moneys granted to elementary and secondary schools:

"In the Federally-affected area programs . . . for construction aid and for general support of the operation of elementary or secondary schools, or in programs for more limited support to such schools such as for the acquisition of equipment, the provision of vocational education, or the provision of guidance and counseling services, discrimination by the recipient school district in any of its elementary or secondary schools in the admission of students, or in the treatment of its students in any aspect of the educational process, is prohibited. In this and the following illustrations the prohibition of discrimination in the treatment of students . . . includes the prohibition of discrimination among the students . . . in the availability or use of any academic, dormitory, eating, recreational, or other facilities of the grantee or other recipient." 45 CFR § 80.5(b) (1972).

It must have been clear to the Congress enacting Title IX, therefore, that the administrative interpretation of that statute would follow a similarly expansive approach. Nothing in the legislative history suggests otherwise; and "[i]t is always appropriate to assume that our elected representatives, like other citizens, know the law." *Cannon*, 441 U. S., at 696–697.

Nor were there any outstanding court decisions in 1972 that would have led Congress to believe that Title VI was much narrower in scope. The principal judicial interpretations of Title VI prior to 1972 were announced by the United States Court of Appeals for the Fifth Circuit. In a school desegregation case, for example, the court expressly approved the Department's desegregation guidelines, while noting the broad purposes underlying the prohibitory section of Title VI. *United States* v. *Jefferson County Board of Education*, 372 F. 2d 836, 881–882 (CA5 1966), adopted en banc, 380 F. 2d 385 (CA5 1967) *(per curiam)* ("'The legality is based on the general power of Congress to apply reasonable conditions. . . . In general, it seems rather anomalous that the Federal Government should aid and abet discrimination on the basis of race, color or national origin by granting money and other kinds of financial aid'") (quoting Cong. Celler). In another desegregation case, the court noted that Title VI "states a reasonable condition that the United States may attach to any grant of financial assistance and may enforce by refusal or withdrawal of federal assistance." *Bossier Parish School Board* v. *Lemon*, 370 F. 2d 847, 852 (CA5 1967). More significantly, the court went on to equate a local school system with a "program or activity" receiving federal aid, noting that the "School Board accepted federal financial assistance in November 1964, and thereby brought its school system within the class of programs subject to the section 601 prohibition against discrimination." *Ibid.*

Finally, in *Board of Public Instruction* v. *Finch*, 414 F. 2d 1068 (CA5 1969), the court spoke more directly to the program-specific limitation in Title VI. Although the court refused "to assume . . . that defects in one part of a school system automatically infect the whole," *id.*, at 1074, and rejected the definition of the term "program" offered by the Department, *id.*, at 1077, the court also noted that "the purpose of the Title VI cutoff is best effectuated by separate consideration of the use or intended use of federal funds under each grant statute," *id.*, at 1078. In particular, although "there will . . . be cases from time to time where a particular program, within a state, within a county, within a district, even within a school . . . , is effectively insulated from otherwise unlawful activities," termination of federal funds is proper if they "are administered in a discriminatory manner, or if they support a program which is infected by a discriminatory environment." *Ibid.* To this end, the court remanded the case to the Department for specific findings on the relationship, if any, between the three types of federal grants received by the school system (federal aid for the education of children from low-income families, for supplementary education centers, and for adult education) and the system's discriminatory practices.

In short, the judicial interpretations of Title VI existing in 1972 were either in agreement with the expansive reach of the Department's regulations, *Bossier Parish*, *supra*; *Jefferson County*, *supra*, or sanctioned a broad-based termination of federal aid if the funded programs were affected by discriminatory practices, *Finch*, *supra*. See also Note, 55 Geo. L. J. 325, 344–345 (1966) (supporting Department's treatment of a school district as an individual program). Cf. *Lau* v. *Nichols*, 414 U. S. 563, 568 (1974) (treating an entire school system or school district as an "educational program" under Title VI). Like the existing administrative regulations, therefore, they provide strong support for the view that Congress intended an expansive interpretation of the program-specific language included in Title IX. Because Members of Congress "repeated[ly] refer[red] to Title VI and its modes of enforcement, we are especially justified in presuming both that those representatives were aware of the prior interpretation of Title VI and that that interpretation reflects their intent with respect to Title IX." *Cannon, supra*, at 697–698.

C

If any doubt remains about the congressional intent underlying the program-specific language included in Title IX, it is removed by the unique postenactment history of the statute. "Although postenactment developments cannot be accorded 'the weight of contemporary legislative history, we would be remiss if we ignored these authoritative expressions concerning the scope and purpose of Title IX. . . .'" *North Haven*, 456 U. S., at 535 (quoting *Cannon, supra*, at 687, n. 7). See also *ante*, at 567–568.

Regulations promulgated by the Department to implement Title IX, both as proposed, 39 Fed. Reg. 22228 (1974), and as finally adopted, 40 Fed. Reg. 24128 (1975), included an interpretation of program specificity consistent with the view of Title VI and with the congressional intent behind Title IX outlined above. In particular, the regulations prohibited sex discrimination "under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives or benefits from Federal financial assistance." *Id.*, at 24140 (now codified at 34 CFR § 106.31 (1983)). Introductory remarks explained the basis for the agency's decision:

> "[T]itle IX will be consistent with the interpretation of similar language contained in title VI of the Civil Rights Act of 1964. . . . Therefore, an education program or activity or part thereof operated by a recipient of Federal financial assistance administered by the Department will be subject to the requirements of this regulation if it receives or benefits from such assistance.[8] This inter-

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[8] In *North Haven*, we concluded that the word "it" in this sentence refers to "education program or activity" rather than "recipient." 456 U. S.,

> pretation is consistent with the only case specifically ruling on the language contained in title VI, which holds that Federal funds may be terminated under title VI upon a finding that they '[are] infected by a discriminatory environment.'" 40 Fed. Reg., at 24128 (quoting *Finch*, 414 F. 2d, at 1078–1079).

Thus, the agency charged with the statute's implementation initially interpreted the program-specific language of Title IX in a manner consistent with the view of Congress' intent outlined above—to allow for application of the statute to an entire institution if the institution is comprised of education programs or activities that receive or benefit from federal moneys.

Moreover, pursuant to § 431(d)(1) of the General Education Provisions Act, as amended by Pub. L. 93–380, 88 Stat. 567, these regulations were submitted to Congress for review. As we explained in *North Haven*, *supra*, at 531–532 (quoting 20 U. S. C. § 1232(d)(1)), this "laying before" procedure afforded Congress an opportunity to disapprove any regulation that it found to be "inconsistent with the Act from which it derives its authority." And although the regulations interpreting the program-specific limitations of Title IX were explicitly considered by both Houses of Congress, no resolutions of disapproval were passed by the Legislature.

In particular, two resolutions to invalidate the Department's regulations were proposed in the Senate, each specifically challenging the regulations because of the program-

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at 539, n. 30. Even with this limiting construction, however, the regulations still apply to any education program or activity which "receives *or benefits*" from federal assistance. In any event, given the Department's own interpretation of the words quoted in the text, our limiting construction may have been unjustified. See HEW Fact Sheet Accompanying Final Title IX Regulation Implementing Education Amendments of 1972, p. 3 (June 1975) ("Except for the specific limited exemptions set forth below, the final regulation applies to all aspects of all education programs or activities of a school district, institution of higher education, or other entity which receives Federal funds for any of those programs").

specificity requirements of Title IX. One resolution would have provided a blanket disapproval of the regulations, S. Con. Res. 46, 94th Cong., 1st Sess. (1975), premised in part on the view that "[t]he regulations are inconsistent with the enactment in that they apply to programs or activities not receiving Federal funds such as athletics and extracurricular activities," 121 Cong. Rec. 17300 (1975) (remarks of Sen. Helms). The other resolution was aimed more particularly at the regulation of athletic programs and activities not receiving direct federal moneys, but also was premised on the program-specific limitations in the statute. See S. Con. Res. 52, 94th Cong., 1st Sess. (1975).[9] Neither resolution,

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[9] The sponsor of this second resolution explained the basis for his proposal to his Senate colleagues:

"[T]here is not a college athletic department anywhere in the country that receives Federal funds. The intercollegiate athletics provisions of the regulations are thus inconsistent with the statute in that they impose requirements on college programs not receiving Federal assistance.

"HEW attempts to surmount this obvious inconsistency through recourse to semantics. The statute clearly refers to programs receiving Federal assistance and the courts have established that programs are in fact separable. Yet, HEW argues, when pressed, that its authority includes not only those programs actually receiving Federal assistance but those which indirectly benefit from that assistance as well. Thus, according to this tortious logic, college football receives Federal assistance because it may benefit indirectly from federally guaranteed student loans unrelated to athletics or a student athlete may use the school library whose construction was assisted by Federal funding. Needless to say, this is a rather slender reed upon which to base a social policy of this magnitude." 121 Cong. Rec. 22941 (1975) (remarks of Sen. Laxalt).

Despite this rhetorical flourish, Congress has consistently endorsed the Department's regulation of college athletic programs, and indeed has affirmatively required such regulations. See, *e. g.*, Pub. L. 93–380, § 844, 88 Stat. 612 ("The Secretary shall prepare and publish . . . proposed regulations implementing the provisions of title IX . . . relating to the prohibition of sex discrimination in federally assisted education programs which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports"). See also Brief for Council of Collegiate Women Athletic Administrators as *Amicus Curiae* 4–16. Cf. *Haffer* v. *Temple University*, 524 F. Supp. 531 (ED however, was acted upon after referral to the appropriate Committee.

In the House, extensive hearings were held by two separate Subcommittees of the Committee on Education and Labor. Of primary interest are the six days of hearings held by the Subcommittee on Postsecondary Education to review the Department's regulations "solely to see if they are consistent with the law and with the intent of the Congress in enacting the law." See Sex Discrimination Regulations: Hearings before the Subcommittee on Postsecondary Education of the House Committee on Education and Labor, 94th Cong., 1st Sess., 1 (1975) (1975 Hearings) (remarks of Rep. O'Hara). Among the numerous witnesses testifying about the programmatic reach of the Department's regulations were Senator Bayh, the chief Senate sponsor of the legislation, see *supra*, at 585–586, and HEW Secretary Weinberger. Both strongly supported the scope of the regulations as consistent with the intent evidenced by the 92d Congress in 1972. See, *e. g.*, 1975 Hearings, at 169–171 (statement of Sen. Bayh); *id.*, at 178 (testimony of Sen. Bayh); *id.*, at 438, 485 (testimony of Secretary Weinberger); *id.*, at 487–488 (letter from Secretary Weinberger).[10] Specifically focusing on

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Pa. 1981), aff'd, 688 F. 2d 14 (CA3 1982). The opinion for the Court, limited as it is to a college that receives only "[s]tudent financial aid . . . [that] is *sui generis*," *ante*, at 573, obviously does not decide whether athletic programs operated by colleges receiving other forms of federal financial assistance are within the reach of Title IX. Cf. 688 F. 2d, at 15, n. 5 (discussing the many forms of federal aid received by Temple University and its athletic department).

[10] See also, *e. g.*, 1975 Hearings, at 90 (testimony of Kathy Kelly, President, U. S. National Student Association); *id.*, at 163–166 (testimony of Rep. Mink); *id.*, at 187–191 (memorandum of American Law Division, Library of Congress); *id.*, at 191–196 (memorandum of Center for National Policy Review); *id.*, at 284–285 (statement of Norma Raffel, Head, Education Committee, Women's Equity Action League); *id.*, at 385–388 (testimony of Dr. Bernice Sandler, Director, Project on the Status and Education of Women, Association of American Colleges). But see, *e. g.*, *id.*, at 49 (testimony of Darrell Royal, President, American Football Coaches

the legal basis for the Department's regulations, the Secretary noted:

> "One of the places you look for guidance is in the interpretation that the courts have given to similar statutes. Title VI, in the *Finch* case, was interpreted in a way . . . that programs that have any educational value or any educational meaning are the ones that are covered regardless of whether the Federal funds go specifically to those programs.
>
> "In other words, if the Federal funds go to an institution which has educational programs, then the institution is covered throughout its activities. That essentially was the ruling with respect to similar language in title VI, and that is why we used this interpretation in title IX." *Id.*, at 485.

Then, in a subsequent letter submitted to the Subcommittee, Secretary Weinberger addressed the precise issue posed by Grove City College in this case:

> "[I]f students attending an institution of higher education are receiving benefits under the various Federal educational assistance programs, then *all* of the institution's activities that are supported by tuition payments of the students can be said to be receiving Federal financial assistance." *Id.*, at 488 (emphasis in original).[11]

Association); *id.*, at 98–99 (testimony of John A. Fuzak, President, National Collegiate Athletic Association); *id.*, at 231–232 (statement of Dallin H. Oaks, President, Brigham Young University); *id.*, at 403–406 (testimony of Janet L. Kuhn).

[11] The Secretary specifically cited and quoted from *Bob Jones University* v. *Johnson*, 396 F. Supp. 597 (SC 1974), affirmance order, 529 F. 2d 514 (CA4 1975), a decision interpreting the application of Title VI to a college that enrolled students receiving veterans' educational benefits. The court in *Bob Jones* offered several reasons to justify its finding that the college's educational program was receiving federal assistance:

"First, payments to veterans enrolled at approved schools serve to defray the costs of the educational program of the schools thereby releasing insti-

Despite the attention focused upon, and the strong defense offered in support of, the programmatic reach of the Department's regulations at these hearings, the House offered no formal resistance to the regulations. Indeed, among the several resolutions of disapproval introduced in the House, only one directly mentioned this aspect of the regulations, and this resolution was not acted upon either by committee or by the full House. H. R. Con. Res. 311, 94th Cong., 1st Sess. (1975) (disapproving regulations that "would apply to athletic programs and grants which neither receive nor benefit from Federal financial assistance"); see 121 Cong. Rec. 19209 (1975).

Although the failure of Congress to disapprove the Department's regulations is not itself determinative, it does "len[d] weight to the argument" that the regulations were consistent with congressional intent. *North Haven*, 456 U. S., at 534. Moreover, "the relatively insubstantial interest given the resolutions of disapproval that were introduced seems particularly significant since Congress has proceeded to amend [Title IX] when it has disagreed with [the Department's] in-

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tutional funds which would, in the absence of federal assistance, be spent on the student. . . .

"[S]econd . . . the participation of veterans who—but for the availability of federal funds—would not enter the educational programs of the approved school, benefits the school by enlarging the pool of qualified applicants upon which it can draw for its educational program.

"Finally, . . . [g]rant programs frequently use institutions as conduits through which federal funds or other assistance pass to the ultimate beneficiaries. Clearly, Title VI attaches to a recipient acting in that capacity. . . . The altered method of payment under the current statutes [under which federal moneys go directly to the students] does not change the nature of the program or the basic role of the schools participating in the program. . . . [T]he nondiscriminatory participation of these schools is essential if the benefits of these statutes are to flow to beneficiaries without regard to race." 396 F. Supp., at 602–603 (footnotes omitted).

The court also explained that coverage of the college's educational program was fully consistent with the congressional purpose underlying Title VI. See *id.*, at 604.

terpretation of the statute." *Ibid.* Indeed, those amendments, by exempting from the reach of Title IX various facilities or services at educational institutions that themselves do not receive direct federal aid, strongly suggest that Congress understands the statute otherwise to encompass such programs or activities.[12]

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[12] In 1974, after the Department had published its proposed regulations for Title IX, the Congress excepted social fraternities and sororities and voluntary youth service organizations from the statute's reach. Pub. L. 93–568, § 3(a), 88 Stat. 1862 (codified at 20 U. S. C. § 1681(a)(6)); see 120 Cong. Rec. 41390–41394 (1974). Later, in 1976, Congress provided statutory exemptions for activities related to Boys/Girls State/Nation conferences, father-son or mother-daughter activities (if reasonable opportunities exist for the opposite sex), and collegiate scholarships awarded to "beauty" pageant winners. Pub. L. 94–482, § 412(a), 90 Stat. 2234 (codified at 20 U. S. C. §§ 1681(a)(7–9)); see 122 Cong. Rec. 27979–27987 (1976). Obviously, since none of these activities receive direct federal support, these amendments would have been superfluous unless Title IX was otherwise to be applied to such activities when conducted by educational institutions receiving federal funds.

Other congressional developments since the issuance of the Department's regulations, which have not resulted in amendments to the statute, lend even more support to the broader view of Title IX. After the Department's final regulations went into effect in 1975, for example, Senator Helms introduced amendments to Title IX which would have defined "education programs and activities" to mean "only programs or activities which are an integral part of the required curriculum of an educational institution." S. 2146, § 2(1), 94th Cong., 1st Sess. (1975); see 121 Cong. Rec. 23845–23847 (1975). No action was taken on the bill. Similarly, in 1976, Senator McClure sponsored an amendment to define "education program or activity" as "such programs or activities as are curriculum or graduation requirements of the institutions." Amendment No. 389 to S. 2657, 94th Cong., 2d Sess. (1976); see 122 Cong. Rec. 28136 (1976). This amendment was rejected in a recorded vote. *Id.*, at 28147. Finally, the 98th Congress has recently reaffirmed its commitment to Title IX and to the regulations originally issued thereunder. In particular, the House passed (414–8) a resolution expressing its belief that Title IX and its regulations "should not be amended or altered in any manner which will lessen the comprehensive coverage of such statute in eliminating gender discrimination throughout the American educational system." H. Res. 190, 98th Cong., 1st Sess. (1983); 129 Cong. Rec. H10085–H10095, H10100–H10101 (Nov. 16, 1983). See H. R. Rep. No. 98–418 (1983). See also S. Res. 149, In conclusion, each of the factors relevant to the interpretation of the program-specificity requirements of Title IX, taken individually or collectively, demonstrates that the Court today limits the reach of Title IX in a way that was wholly unintended by Congress. The contemporaneous legislative history of Title IX, the relevant interpretation of similar language in Title VI, and the administrative and legislative interpretations of Title IX since the statute's original enactment all lead to the same conclusion: that Title IX coverage for an institution of higher education is appropriate if federal moneys are received by or benefit the entire institution.

II

A proper application of Title IX to the circumstances of this case demonstrates beyond peradventure that the Court has unjustifiably limited the statute's reach. Grove City College enrolls approximately 140 students who utilize Basic Educational Opportunity Grants (BEOG's) to pay for their education at the College. Although the grant moneys are paid directly to the students, the Court properly concludes that the use of these federal moneys at the College means that the College "receives Federal financial assistance" within the meaning of Title IX. The Court also correctly notes that a principal purpose underlying congressional enactment of the BEOG program is to provide funds that will benefit colleges and universities as a whole. It necessarily follows, in my view, that the entire undergraduate institution operated by Grove City College is subject to the antidiscrimination provisions included in Title IX.

A

In determining the scope of Title IX coverage, the primary focus should be on the purposes meant to be served by the

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98th Cong., 1st Sess. (1983). After today's Court decision, it will take another reaffirmation of congressional intent, in the form of a clarifying amendment to Title IX, to ensure that the original legislative will is no longer frustrated.

particular federal funds received by the institution.[13] In this case, Congress has clearly indicated that BEOG moneys are intended to benefit any college or university that enrolls students receiving such grants. As the Court repeatedly recognizes: "The legislative history of the [Education Amendments of 1972] is replete with statements evincing Congress' awareness that the student assistance programs established by the amendments would significantly aid colleges and universities. In fact, one of the stated purposes of the student aid provisions was to 'provid[e] assistance to institutions of higher education.' Pub. L. 92–318, § 1001(c)(1), 86 Stat. 381, 20 U. S. C. § 1070(a)(5)." *Ante*, at 565–566 (footnote omitted). See also *ante*, at 564 (Title IX "contains no hint that Congress perceived a substantive difference between direct institutional assistance and aid received by a school through its students"); *ante*, at 565, n. 13 ("student aid programs . . . were . . . designed to assist colleges and universities"); *ante*, at 569, n. 19 ("The history of [the reenactments of the statutory authorization for BEOG's] makes clear that Congress regards BEOG's and other forms of student aid as a critical source of support for educational institutions").

In many respects, therefore, Congress views financial aid to students, and in particular BEOG's, as the functional equivalent of general aid to institutions. Given this undeniable and clearly stated congressional purpose, it would seem to be self-evident that Congress intended colleges or universities enrolling students who receive BEOG's to be covered, in their entirety, by the antidiscrimination provisions of Title IX. That statute's primary purpose, after all, is to ensure that federal moneys are not used to support discriminatory practices. *Cannon*, 441 U. S., at 704.

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[13] Because I believe that BEOG moneys are intended by Congress to benefit institutions of higher education in their entirety, I find it unnecessary in this case to decide whether Title IX's reach would be the same when more targeted federal aid is being received by an institution. For such cases, it may be appropriate to examine carefully not only the purposes but also the actual effects of the federal moneys received.

Under the Court's holding, in contrast, Grove City College is prohibited from discriminating on the basis of sex in its own "financial aid program," but is free to discriminate in other "programs or activities" operated by the institution. Underlying this result is the unstated and unsupportable assumption that moneys received through BEOG's are meant only to be utilized by the College's financial aid program. But it is undisputed that BEOG moneys, paid to the institution as tuition and fees and used in the general operating budget, are utilized to support most, and perhaps all, of the facilities and services that together constitute Grove City College.[14]

The absurdity of the Court's decision is further demonstrated by examining its practical effect. According to the Court, the "financial aid program" at Grove City College may not discriminate on the basis of sex because it is covered by Title IX, but the College is not prohibited from discriminating in its admissions, its athletic programs, or even its various academic departments. The Court thus sanctions practices that Congress clearly could not have intended: for example, after today's decision, Grove City College would be free to segregate male and female students in classes run by its mathematics department. This would be so even though the affected students are attending the College with the financial assistance provided by federal funds. If anything about Title IX were ever certain, it is that discriminatory practices like the one just described were meant to be prohibited by the statute.

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[14] Although JUSTICE STEVENS properly notes that there have been no findings of fact on this particular point, see *ante*, at 580–581 (concurring in part and concurring in result), even the Court is forced to concede the obvious, see *ante*, at 573 ("It is true, of course, that substantial portions of the BEOG's received by Grove City's students ultimately find their way into the College's general operating budget and are used to provide a variety of services to the students through whom the funds pass"). The Court nonetheless ignores its own concession by claiming that there is "no persuasive evidence" that Congress intended to cover an entire institution of higher education in this situation. As I explain in Part II, however, the evidence of congressional intent is quite persuasive, if not convincing.

B

The Court, moreover, does not offer any defensible justification for its holding. First, the Court states that it has "no doubt" that BEOG's administered through the Regular Disbursement System (RDS) are received, not by the entire College, but by its financial aid program. Thus, the Court reasons, BEOG's administered through the Alternative Disbursement System must also be received only by the financial aid program. The premise of this syllogism, however, simply begs the question presented; until today's decision, there was considerable doubt concerning the reach of Title IX in a college or university administering BEOG's through the RDS. Indeed, the extent to which Title IX covers an educational institution receiving BEOG's is the same regardless of the procedural mechanism chosen by the college to disburse the student aid. With this argument, therefore, the Court is simply restating the question presented by the case.

Second, the Court rejects the notion that the federal funds disbursed under the BEOG program are received by the entire institution because they effectively "free up" the College's own resources for use by all programs or activities that are operated by Grove City College. But coverage of an entire institution that receives BEOG's through its students is not dependent upon such a theory. Instead, Title IX coverage for the whole undergraduate institution at Grove City College is premised on the congressional intent that BEOG moneys would provide aid for the college or university as a whole. Therefore, whatever merit the Court's argument may have for federal moneys that are intended solely to benefit a particular aspect of an educational institution, such as a research grant designed to assist a specific laboratory or professor, see n. 13, *supra,* the freeing-up theory is simply irrelevant when the federal financial assistance is meant to benefit the entire institution.

Third, the Court contradicts its earlier recognition that BEOG's are no different from general aid to a college or university by claiming that "[s]tudent financial aid programs . . . are *sui generis.*" *Ante,* at 573. Although this assertion serves to limit severely the effect of the Court's holding, it is wholly unexplained, especially in light of the forceful evidence of congressional intent to the contrary. Indeed, it would be more accurate to say that financial aid for students is the prototypical method for funneling federal aid to institutions of higher education.

Finally, although not explicitly offered as a rationale, the Court's holding might be explained by its willingness to defer to the Government's position as it has been represented to this Court. But until the Government filed its briefs in this case, it had consistently argued that Title IX coverage for the entire undergraduate institution operated by Grove City College was authorized by the statute. See *ante,* at 562, n. 10, 570. The latest position adopted by the Government, irrespective of the motivations that might underlie this recent change, is therefore entitled to little, if any, deference. Cf. *North Haven,* 456 U. S., at 522–523, n. 12, 538–539, n. 29 (deference not appropriate when "there is no consistent administrative interpretation of the Title IX regulations"). The interpretation of statutes as important as Title IX should not be subjected so easily to shifts in policy by the executive branch.

III

In sum, the program-specific language in Title IX was designed to ensure that the reach of the statute is dependent upon the scope of federal financial assistance provided to an institution. When that financial assistance is clearly intended to serve as federal aid for the entire institution, the institution as a whole should be covered by the statute's prohibition on sex discrimination. Any other interpretation clearly disregards the intent of Congress and severely weakens the antidiscrimination provisions included in Title IX. I therefore cannot join in Part III of the Court's opinion.

UNITED STATES *v.* DOE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 82–786. Argued December 7, 1983—Decided February 28, 1984

During a federal grand jury investigation of corruption in the awarding of county and municipal contracts, subpoenas were served on respondent owner of sole proprietorships demanding production of certain business records of several of his companies. Respondent then filed a motion in Federal District Court seeking to quash the subpoenas. The District Court granted the motion (except as to records required by law to be kept or disclosed to a public agency), finding that the act of producing the records would involve testimonial self-incrimination. The Court of Appeals affirmed, holding that the records were privileged, that the act of producing them also would have "communicative aspects of its own" in that the turning over of the records to the grand jury would admit their existence, possession, and authenticity, and that hence respondent was entitled to assert his Fifth Amendment privilege against compelled self-incrimination rather than produce the records. The court further held that in view of the Government's failure to make a formal request for use immunity under 18 U. S. C. §§ 6002 and 6003, it was proper to reject the Government's attempt to compel delivery of the records.

Held:

1. The contents of the subpoenaed records in question are not privileged under the Fifth Amendment. That Amendment protects the person asserting the privilege only from *compelled* self-incrimination. *Fisher* v. *United States*, 425 U. S. 391, 396. Where the preparation of business records is voluntary, no compulsion is present. Here, respondent does not claim that he prepared the records involuntarily or that the subpoenas would force him to restate, repeat, or affirm the truth of the records' contents. The fact that the records are in his possession is irrelevant to the determination of whether the creation of the records was compelled. Pp. 610–612.

2. The act of producing the documents at issue in this case is privileged. Pp. 612–614.

3. The act of producing the subpoenaed documents cannot be compelled without a statutory grant of use immunity pursuant to 18 U. S. C. §§ 6002 and 6003. This Court will not extend the jurisdiction of courts to include prospective grants of use immunity under a doctrine of con-

structive use immunity (as the Government urges), in the absence of the formal request that the statute requires. Pp. 614–617.

680 F. 2d 327, affirmed in part, reversed in part, and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, REHNQUIST, and O'CONNOR, JJ., joined. O'CONNOR, J., filed a concurring opinion, *post*, p. 618. MARSHALL, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN, J., joined, *post*, p. 618. STEVENS, J., filed an opinion concurring in part and dissenting in part, *post*, p. 619.

Samuel A. Alito, Jr., argued the cause for the United States. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General Trott*, *Deputy Solicitor General Frey*, and *Joel M. Gershowitz*.

Richard T. Philips argued the cause and filed a brief for respondent.

JUSTICE POWELL delivered the opinion of the Court.

This case presents the issue whether, and to what extent, the Fifth Amendment privilege against compelled self-incrimination applies to the business records of a sole proprietorship.

I

Respondent is the owner of several sole proprietorships. In late 1980, a grand jury, during the course of an investigation of corruption in the awarding of county and municipal contracts, served five subpoenas on respondent. The first two demanded the production of the telephone records of several of respondent's companies and all records pertaining to four bank accounts of respondent and his companies. The subpoenas were limited to the period between January 1, 1977, and the dates of the subpoenas. The third subpoena demanded the production of a list of virtually all the business records of one of respondent's companies for the period between January 1, 1976, and the date of the subpoena.[1] The fourth subpoena sought production of a similar list of business records belonging to another company.[2] The final subpoena demanded production of all bank statements and cancelled checks of two of respondent's companies that had accounts at a bank in the Grand Cayman Islands.

II

Respondent filed a motion in Federal District Court seeking to quash the subpoenas. The District Court for the District of New Jersey granted his motion except with respect to those documents and records required by law to be kept or disclosed to a public agency.[3] In reaching its decision, the

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[1] The categories of records sought by the third subpoena were: (1) general ledgers; (2) general journals; (3) cash disbursement journals; (4) petty cash books and vouchers; (5) purchase journals; (6) vouchers; (7) paid bills; (8) invoices; (9) cash receipts journal; (10) billings; (11) bank statements; (12) canceled checks and check stubs; (13) payroll records; (14) contracts and copies of contracts, including all retainer agreements; (15) financial statements; (16) bank deposit tickets; (17) retained copies of partnership income tax returns; (18) retained copies of payroll tax returns; (19) accounts payable ledger; (20) accounts receivable ledger; (21) telephone company statement of calls and telegrams, and all telephone toll slips; (22) records of all escrow, trust, or fiduciary accounts maintained on behalf of clients; (23) safe deposit box records; (24) records of all purchases and sales of all stocks and bonds; (25) names and home addresses of all partners, associates, and employees; (26) W–2 forms of each partner, associate, and employee; (27) workpapers; and (28) copies of tax returns.

[2] The only documents requested in the fourth subpoena that were not requested in the third were the company's stock transfer book, any corporate minutes, the corporate charter, all correspondence and memoranda, and all bids, bid bonds, and contracts. The request for "corporate" minutes and the "corporate" charter is puzzling because the company named in the subpoena was an unincorporated sole proprietorship.

[3] The District Court mentioned tax returns and W–2 statements as examples of documents falling within this category. Respondent has not challenged this aspect of the District Court's opinion. We therefore understand that this case concerns only business documents and records not required by law to be kept or disclosed to a public agency. We also note

District Court noted that the Government had conceded that the materials sought in the subpoena were or might be incriminating. The court stated that, therefore, "the relevant inquiry is . . . whether the *act* of producing the documents has communicative aspects which warrant Fifth Amendment protection." *In re Grand Jury Empanelled March 19, 1980*, 541 F. Supp. 1, 3 (1981) (emphasis in original). The court found that the act of production would compel respondent to "admit that the records exist, that they are in his possession, and that they are authentic." *Ibid.* While not ruling out the possibility that the Government could devise a way to ensure that the act of turning over the documents would not incriminate respondent, the court held that the Government had not made such a showing.

The Court of Appeals for the Third Circuit affirmed. *In re Grand Jury Empanelled March 19, 1980*, 680 F. 2d 327 (1982). It first addressed the question whether the Fifth Amendment ever applies to the records of a sole proprietorship. After noting that an individual may not assert the Fifth Amendment privilege on behalf of a corporation, partnership, or other collective entity under the holding of *Bellis* v. *United States*, 417 U. S. 85 (1974),[4] the Court of Appeals reasoned that the owner of a sole proprietorship acts in a personal rather than a representative capacity. As a result, the court held that respondent's claim of the privilege was not foreclosed by the reasoning of *Bellis*. 680 F. 2d, at 331.

The Court of Appeals next considered whether the documents at issue in this case are privileged. The court noted that this Court held in *Fisher* v. *United States*, 425 U. S. 391 (1976), that the contents of business records ordinarily are

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that our opinion addresses only the Fifth Amendment implications of the subpoenas. The subpoenas were drawn in the broadest possible terms. It may be that the breadth of the subpoenas is subject to attack on other grounds that are not before us.

[4] *Bellis* defined a "collective entity" as "an organization which is recognized as an independent entity apart from its individual members." 417 U. S., at 92.

not privileged because they are created voluntarily and without compulsion. The Court of Appeals nevertheless found that respondent's business records were privileged under either of two analyses. First, the court reasoned that, notwithstanding the holdings in *Bellis* and *Fisher*, the business records of a sole proprietorship are no different from the individual owner's personal records. Noting that Third Circuit cases had held that private papers, although created voluntarily, are protected by the Fifth Amendment,[5] the court accorded the same protection to respondent's business papers.[6] Second, it held that respondent's act of producing the subpoenaed records would have "communicative aspects of its own." 680 F. 2d, at 335. The turning over of the subpoenaed documents to the grand jury would admit their existence and authenticity. Accordingly, respondent was entitled to assert his Fifth Amendment privilege rather than produce the subpoenaed documents.

The Government contended that the court should enforce the subpoenas because of the Government's offer not to use respondent's act of production against respondent in any way. The Court of Appeals noted that no formal request for use immunity under 18 U. S. C. §§ 6002 and 6003 had been made. In light of this failure, the court held that the District Court did not err in rejecting the Government's attempt to compel delivery of the subpoenaed records.

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[5] See *In re Grand Jury Proceedings (Johanson)*, 632 F. 2d 1033 (1980); *ICC* v. *Gould*, 629 F. 2d 847 (1980), cert. denied, 449 U. S. 1077 (1981).

[6] JUSTICE STEVENS apparently reads the Court of Appeals' decision as merely affirming the District Court's finding that the act of producing the subpoenaed records was privileged. In support of this hypothesis, he quotes extensively from that portion of the Court of Appeals' opinion that addresses the act-of-production issue. The quoted passage, however, begins *after* the court has discussed whether the records themselves are privileged. After noting that *Fisher* could be read to deprive the contents of a sole proprietorship's records of Fifth Amendment protection, the court noted that other Third Circuit cases—principally *ICC* v. *Gould*, *supra*, had refused to adopt that interpretation. The court stated: "*Gould*, then, stands for the proposition that an individual's business papers, as well as his personal records, cannot be subpoenaed by a grand jury." 680 F. 2d, at 334 (footnote omitted). The court went on to hold, in the alternative, that the act of production is privileged as well. We note in passing that both parties share our interpretation of the Court of Appeals' opinion. Brief for United States 5; Brief for Respondent 3–4.

We granted certiorari to resolve the apparent conflict between the Court of Appeals' holding and the reasoning underlying this Court's holding in *Fisher*. 461 U. S. 913 (1983). We now affirm in part, reverse in part, and remand for further proceedings.

III

A

The Court in *Fisher* expressly declined to reach the question whether the Fifth Amendment privilege protects the contents of an individual's tax records in his possession.[7] The rationale underlying our holding in that case is, however, persuasive here. As we noted in *Fisher*, the Fifth Amendment protects the person asserting the privilege only from *compelled* self-incrimination. 425 U. S., at 396. Where the preparation of business records is voluntary, no compulsion is present.[8] A subpoena that demands production of documents "does not compel oral testimony; nor would it ordinarily compel the taxpayer to restate, repeat, or affirm the truth of the contents of the documents sought." *Id.*, at 409. Applying this reasoning in *Fisher*, we stated:

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[7] In *Fisher*, the Court stated: "Whether the Fifth Amendment would shield the taxpayer from producing his own tax records in his possession is a question not involved here; for the papers demanded here are not his 'private papers,' . . ." 425 U. S., at 414. We note that in some respects the documents sought in *Fisher* were more "personal" than those at issue here. The *Fisher* documents were accountant's workpapers in the possession of the taxpayers' lawyers. The workpapers related to the taxpayers' individual personal returns. To that extent, the documents were personal, even though in the possession of a third party. In contrast, each of the documents sought here pertained to respondent's businesses.

[8] Respondent's principal argument is that the Fifth Amendment should be read as creating a "zone of privacy which protects an individual and his personal records from compelled production." Brief for Respondent 15. This argument derives from language in *Boyd* v. *United States*, 116 U. S. 616, 630 (1886). This Court addressed substantially the same argument in *Fisher:*

> "[T]he Fifth Amendment would not be violated by the fact alone that the papers on their face might incriminate the taxpayer, for the privilege protects a person only against being incriminated by his own compelled testimonial communications. *Schmerber* v. *California*, [384 U. S. 757 (1966)]; *United States* v. *Wade*, [388 U. S. 218 (1967)]; and *Gilbert* v. *California*, [388 U. S. 263 (1967)]. The accountant's workpapers are not the taxpayer's. They were not prepared by the taxpayer, and they contain no testimonial declarations by him. Furthermore, as far as this record demonstrates, the preparation of all of the papers sought in these cases was wholly voluntary, and they cannot be said to contain compelled testimonial evidence, either of the taxpayers or of anyone else. The taxpayer cannot avoid compliance with the subpoena merely by asserting that the item of evidence which he is required to produce contains incriminating writing, whether his own or that of someone else." *Id.*, at 409–410.

This reasoning applies with equal force here. Respondent does not contend that he prepared the documents involun-

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"Within the limits imposed by the language of the Fifth Amendment, which we necessarily observe, the privilege truly serves privacy interests; but the Court has never on any ground, personal privacy included, applied the Fifth Amendment to prevent the otherwise proper acquisition or use of evidence which, in the Court's view, did not involve compelled testimonial self-incrimination of some sort." 425 U. S., at 399.

In *Andresen* v. *Maryland*, 427 U. S. 463 (1976), the petitioner also relied on *Boyd*. In rejecting his argument, we observed that "the continued validity of the broad statements contained in some of the Court's earlier cases [has] been discredited by later opinions." 427 U. S., at 472. See also *United States* v. *Nobles*, 422 U. S. 225, 233, n. 7 (1975).

tarily[9] or that the subpoena would force him to restate, repeat, or affirm the truth of their contents. The fact that the records are in respondent's possession is irrelevant to the determination of whether the creation of the records was compelled. We therefore hold that the contents of those records are not privileged.[10]

B

Although the contents of a document may not be privileged, the act of producing the document may be. *Id.*, at 410. A government subpoena compels the holder of the document to perform an act that may have testimonial aspects and an incriminating effect. As we noted in *Fisher:*

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[9] The Court of Appeals recognized the absence of compulsion in the compilation of the records sought in this case and those sought in *Fisher*. "To be sure, the documents requested here, like those sought in *Fisher*, were voluntarily prepared, and therefore 'cannot be said to contain compelled testimonial evidence' in and of themselves." 680 F. 2d, at 334. The Court of Appeals nevertheless gave our holding in *Fisher* an unduly restrictive reading and found it not to control the outcome in this case.

[10] Accord, *In re Grand Jury Proceedings*, 626 F. 2d 1051, 1055 (CA1 1980) ("The line of cases culminating in *Fisher* have stripped the content of business records of any Fifth Amendment protection"). While not directly on point, *Andresen* v. *Maryland*, *supra*, is consistent with our holding. In *Andresen*, investigators from a bicounty fraud unit obtained warrants to search the petitioner's office. During the search, the investigators seized several incriminating business records relating to the petitioner's practice as a sole practitioner of real estate law. The petitioner sought suppression of the documents on Fourth and Fifth Amendment grounds. The petitioner based his Fifth Amendment argument on "dicta in a number of cases which imply, or state, that the search for and seizure of a person's private papers violate the privilege against self-incrimination." *Id.*, at 471. The Court dismissed this argument and found the documents not to be privileged because the petitioner "had voluntarily committed to writing" any incriminating statements contained therein. *Id.*, at 473. Although *Andresen* involved a search warrant rather than a subpoena, the underlying principle is the same in this context. If the party asserting the Fifth Amendment privilege has voluntarily compiled the document, no compulsion is present and the contents of the document are not privileged.

> "Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It also would indicate the taxpayer's belief that the papers are those described in the subpoena. *Curcio* v. *United States*, 354 U. S. 118, 125 (1957). The elements of compulsion are clearly present, but the more difficult issues are whether the tacit averments of the taxpayer are both 'testimonial' and 'incriminating' for purposes of applying the Fifth Amendment. These questions perhaps do not lend themselves to categorical answers; their resolution may instead depend on the facts and circumstances of particular cases or classes thereof." *Id.*, at 410.

In *Fisher*, the Court explored the effect that the act of production would have on the taxpayer and determined that the act of production would have only minimal testimonial value and would not operate to incriminate the taxpayer. Unlike the Court in *Fisher*, we have the explicit finding of the District Court that the act of producing the documents would involve testimonial self-incrimination.[11] The Court of Appeals agreed.[12] The District Court's finding essentially rests on its

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[11] The District Court stated:

"With few exceptions, enforcement of the subpoenas would compel [respondent] to admit that the records exist, that they are in his possession, and that they are authentic. These communications, if made under compulsion of a court decree, would violate [respondent's] Fifth Amendment rights. . . . The government argues that the existence, possession and authenticity of the documents can be proved without [respondent's] testimonial communication, but it cannot satisfy this court as to how that representation can be implemented to protect the witness in subsequent proceedings." 541 F. Supp., at 3.

[12] The Court of Appeals stated:

"In the matter *sub judice*, however, we find nothing in the record that would indicate that the United States knows, as a certainty, that each of the myriad documents demanded by the five subpoenas in fact is in the appellee's possession or subject to his control. The most plausible inference to be drawn from the broad-sweeping subpoenas is that the Government, unable to prove that the subpoenaed documents exist—or that the appellee determination of factual issues. See *United States* v. *Nixon*, 418 U. S. 683, 702 (1974). Therefore, we will not overturn that finding unless it has no support in the record. *Ibid.* Traditionally, we also have been reluctant to disturb findings of fact in which two courts below have concurred. *Rogers* v. *Lodge*, 458 U. S. 613, 623 (1982). We therefore decline to overturn the finding of the District Court in this regard, where, as here, it has been affirmed by the Court of Appeals.[13]

IV

The Government, as it concedes, could have compelled respondent to produce the documents listed in the subpoena.

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even is somehow connected to the business entities under investigation—is attempting to compensate for its lack of knowledge by requiring the appellee to become, in effect, the primary informant against himself." 680 F. 2d, at 335 (footnote omitted).

[13] The Government concedes that the act of producing the subpoenaed documents might have had some testimonial aspects, but it argues that any incrimination would be so trivial that the Fifth Amendment is not implicated. The Government finds support for this argument in *Marchetti* v. *United States*, 390 U. S. 39 (1968). In *Marchetti*, the Court stated that a party who wishes to claim the Fifth Amendment privilege must be "confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination." *Id.*, at 53; see *United States* v. *Apfelbaum*, 445 U. S. 115, 128 (1980). On the basis of the findings made in this case we think it clear that the risk of incrimination was "substantial and real" and not "trifling or imaginary." Respondent did not concede in the District Court that the records listed in the subpoena actually existed or were in his possession. Respondent argued that by producing the records, he would tacitly admit their existence and his possession. Respondent also pointed out that if the Government obtained the documents from another source, it would have to authenticate them before they would be admissible at trial. See Fed. Rule Evid. 901. By producing the documents, respondent would relieve the Government of the need for authentication. These allegations were sufficient to establish a valid claim of the privilege against self-incrimination. This is not to say that the Government was foreclosed from rebutting respondent's claim by producing evidence that possession, existence, and authentication were a "foregone conclusion." *Fisher*, 425 U. S., at 411. In this case, however, the Government failed to make such a showing.

Title 18 U. S. C. §§ 6002 and 6003 provide for the granting of use immunity with respect to the potentially incriminating evidence.[14] The Court upheld the constitutionality of the use immunity statute in *Kastigar* v. *United States*, 406 U. S. 441 (1972).

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[14] Section 6002 provides:

"Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

"(1) a court or grand jury of the United States,

"(2) an agency of the United States, or

"(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

"and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."

Section 6003 provides:

"(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

"(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment—

"(1) the testimony or other information from such individual may be necessary to the public interest; and

"(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination."

The Government did state several times before the District Court that it would not use respondent's act of production against him in any way. But counsel for the Government never made a statutory request to the District Court to grant respondent use immunity.[15] We are urged to adopt a doctrine of constructive use immunity. Under this doctrine, the courts would impose a requirement on the Government not to use the incriminatory aspects of the act of production against the person claiming the privilege even though the statutory procedures have not been followed.

We decline to extend the jurisdiction of courts to include prospective grants of use immunity in the absence of the formal request that the statute requires.[16] As we stated in *Pillsbury Co.* v. *Conboy*, 459 U. S. 248 (1983), in passing the use immunity statute, "Congress gave certain officials in the Department of Justice exclusive authority to grant immunities." *Id.*, at 253–254 (footnotes omitted). "Congress foresaw the courts as playing only a minor role in the immunizing process . . . ." *Id.*, at 254, n. 11. The decision to seek use immunity necessarily involves a balancing of the Government's interest in obtaining information against the risk that immunity will frustrate the Government's attempts to prosecute the subject of the investigation. See *United States* v. *Mandujano*, 425 U. S. 564, 575 (1976) (plurality opinion). Congress expressly left this decision exclusively to the Justice Department. If, on remand, the appropriate official concludes that it is desirable to compel respondent to produce his business records, the statutory procedure for requesting use immunity will be available.[17]

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[15] Despite repeated questioning at oral argument, counsel for the Government gave no plausible explanation for the failure to request official use immunity rather than promising that the act of producing the documents would not be used against respondent.

[16] Of course, courts generally suppress compelled, incriminating testimony that results from a violation of a witness' Fifth Amendment rights. See *United States* v. *Mandujano*, 425 U. S. 564, 576 (1976); *United States* v. *Blue*, 384 U. S. 251, 255 (1966). The difference between that situation and the Government's theory of constructive use immunity is that in the latter it is the grant of judicially enforceable use immunity that compels the witness to testify. In the former situation, exclusion of the witness' testimony is used to deter the Government from future violations of witnesses' Fifth Amendment rights.

V

We conclude that the Court of Appeals erred in holding that the contents of the subpoenaed documents were privileged under the Fifth Amendment. The act of producing the documents at issue in this case is privileged and cannot be compelled without a statutory grant of use immunity pursuant to 18 U. S. C. §§ 6002 and 6003. The judgment of the Court of Appeals is, therefore, affirmed in part and reversed in part,[18] and the case is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

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[17] Respondent argues that any grant of use immunity must cover the contents of the documents as well as the act of production. We find this contention unfounded. To satisfy the requirements of the Fifth Amendment, a grant of immunity need be only as broad as the privilege against self-incrimination. *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52, 107 (1964) (WHITE, J., concurring); see *Pillsbury Co.* v. *Conboy*, 459 U. S., at 253, n. 8; *United States* v. *Calandra*, 414 U. S. 338, 346 (1974). As discussed above, the privilege in this case extends only to the act of production. Therefore, any grant of use immunity need only protect respondent from the self-incrimination that might accompany the act of producing his business records.

[18] JUSTICE STEVENS states that we should affirm the Court of Appeals decision as a whole because our reasoning is entirely consistent with that of the courts below. See *post*, at 623. As we stated above, see n. 6, *supra*, we read the opinion of the Court of Appeals as holding that the contents of the subpoenaed records were privileged. It is that aspect of the court's opinion that we reverse today. Were we to adopt JUSTICE STEVENS' suggestion, respondent could argue on remand that any grant of use immunity must cover the contents of the records because the records themselves are privileged under the holding of the Court of Appeals. To avoid that result, we must reverse the decision below insofar as it held that the contents of the subpoenaed records are privileged.

JUSTICE O'CONNOR, concurring.

I concur in both the result and reasoning of JUSTICE POWELL's opinion for the Court. I write separately, however, just to make explicit what is implicit in the analysis of that opinion: that the Fifth Amendment provides absolutely no protection for the contents of private papers of any kind. The notion that the Fifth Amendment protects the privacy of papers originated in *Boyd* v. *United States*, 116 U. S. 616, 630 (1886), but our decision in *Fisher* v. *United States*, 425 U. S. 391 (1976), sounded the death knell for *Boyd*. "Several of *Boyd*'s express or implicit declarations [had] not stood the test of time," 425 U. S., at 407, and its privacy of papers concept "ha[d] long been a rule searching for a rationale . . . ." *Id.*, at 409. Today's decision puts a long overdue end to that fruitless search.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, concurring in part and dissenting in part.

I concur in the Court's affirmance of the Court of Appeals' ruling that the act of producing the documents could not be compelled without an explicit grant of use immunity pursuant to 18 U. S. C. §§ 6002 and 6003. I dissent, however, with respect to that part of the Court's opinion reversing the Court of Appeals. The basis for the reversal is the majority's disagreement with the Court of Appeals' discussion of whether the Fifth Amendment protected the contents of the documents respondent sought to withhold from disclosure. Inasmuch as the Court of Appeals' judgment did not rest upon the disposition of this issue, this Court errs by reaching out to decide it. As JUSTICE STEVENS rightly insists, "'[t]his Court . . . reviews judgments, not statements in opinions.'" *Post*, at 619 (quoting *Black* v. *Cutter Laboratories*, 351 U. S. 292, 297 (1956)).

Contrary to what JUSTICE O'CONNOR contends, *ante*, at 618, I do not view the Court's opinion in this case as having reconsidered whether the Fifth Amendment provides protection for the contents of "private papers of any kind." This case presented nothing remotely close to the question that JUSTICE O'CONNOR eagerly poses and answers. First, as noted above, the issue whether the Fifth Amendment protects the contents of the documents was obviated by the Court of Appeals' rulings relating to the act of production and statutory use immunity. Second, the documents at stake here are business records[1] which implicate a lesser degree of concern for privacy interests than, for example, personal diaries.[2]

Were it true that the Court's opinion stands for the proposition that "the Fifth Amendment provides absolutely no protection for the contents of private papers of any kind," *ibid.*, I would assuredly dissent. I continue to believe that under the Fifth Amendment "there are certain documents no person ought to be compelled to produce at the Government's request." *Fisher* v. *United States*, 425 U. S. 391, 431–432 (1976) (MARSHALL, J., concurring in judgment).

JUSTICE STEVENS, concurring in part and dissenting in part.

"This Court . . . reviews judgments, not statements in opinions." *Black* v. *Cutter Laboratories*, 351 U. S. 292, 297

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[1] As the majority notes, "each of the documents sought here pertained to respondent's businesses." *Ante*, at 610, n. 7.

[2] See *Couch* v. *United States*, 409 U. S. 322, 350 (1973) (MARSHALL, J., dissenting) ("Diaries and personal letters that record only their author's personal thoughts lie at the heart of our sense of privacy. In contrast, I see no bar in the . . . Fifth Amendment to the seizure of a letter from one conspirator to another directing the recipient to take steps that further the conspiracy. Business records . . . lie between those cases").

(1956).[1] When both the District Court and the Court of Appeals correctly apply the law, and correctly dispose of the issue before them, I think it is poor appellate practice for this Court to reverse.

The question in this case is whether, without tendering statutory immunity, the Government can compel the sole proprietor of a business to produce incriminating records pursuant to a grand jury subpoena. Except for the records that are required by law to be kept or to be disclosed to public agencies, the District Court held that production could not be required. The basis for that decision turned, not on any suggestion that the contents of the documents were privileged, but rather on the significance of the act of producing them. As the District Court explained:

> "[T]he relevant inquiry is not whether the subpoenaed documents on their face reveal incriminating communications, but whether the *act* of producing the documents has communicative aspects which warrant Fifth Amendment protection. *Fisher* v. *United States*, 425 U. S. 391 . . . (1976). In yielding to the command of the subpoena, Mr. [Doe] may be required to make any one of several communications. The mere act of producing the documents may be considered 'a communication of testimonial significance as an admission that the subpoenaed records exist and that they are authentic.' *In Re Grand Jury Empanelled (Colucci)*, 597 F. 2d 851, 861 (3d Cir. 1979); *Andresen* v. *Maryland*, 427 U. S. 463, 475 . . . (1976) ('the Fifth Amendment may protect an individual from complying with a subpoena for the production of his personal records in his possession because the very act of production may constitute a compulsory authentication of incriminating information'). In addition, the act of

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[1] More particularly, we review the judgment that the Court of Appeals entered in this case, not the judgment that it may have entered in some other case, see *ante*, at 609, n. 6, or some isolated statement in its opinion commenting on the holding in some other case.

> production may indicate a belief that the papers produced are those described in the subpoena. *Fisher*, 425 U. S. at 410 . . . .
>
> "With few exceptions, enforcement of the subpoenas would compel Mr. [Doe] to admit that the records exist, that they are in his possession, and that they are authentic. These communications, if made under compulsion of a court decree, would violate Mr. [Doe's] Fifth Amendment rights." *In re Grand Jury Empanelled March 19, 1980*, 541 F. Supp. 1, 3 (NJ 1981).[2]

The Court of Appeals agreed with the District Court's reasoning and affirmed. It explained:

> "To be sure, the documents requested here, like those sought in *Fisher*, were voluntarily prepared, and therefore 'cannot be said to contain compelled testimonial evidence' in and of themselves. *See Fisher, supra*, 425 U. S. at 409–10 . . . . But the Supreme Court in *Fisher* went to great lengths to demonstrate that, in certain situations, the very act of producing subpoenaed records might amount to an incriminating declaration. *See id.* at 410–13 . . . ; *see also id.* at 430–34 . . . (Marshall, J., concurring in the judgment). And such a situation, we believe, is present in the dispute at bar.
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> . . . . .
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> "The record contains no explanation by the United States as to how documents of this sort could be authenticated without the appellee's explicit or implicit participation. As the district court observed in this connection,
>
> 'the government can give no assurances that the act of turning over the documents will not constitute incrimi-

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[2] Similarly, during oral argument in the District Court, Judge Sarokin stated: "If you can resolve it to my satisfaction I have no hesitancy in saying, yes, I will direct the turn-over, but only on the condition that the act of turn-over will not be utilized against the target." App. 35.

> nating admissions against [the appellee] either before the grand jury or at a subsequent trial, if he is indicted. The government argues that the existence, possession and authenticity of the documents can be proved without [the appellee's] testimonial communication, but it cannot satisfy this court as to how that representation can be implemented to protect [the appellee] in subsequent proceedings.'
>
> "Appendix at 98 (footnote omitted). Under these circumstances, we are unable to say, as did the Court in *Fisher*, that responding to the subpoenas 'would not appear to represent a substantial threat of self-incrimination.' 425 U. S. at 413 . . . .
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> "Accordingly, we hold, therefore, that enforcement of these subpoenas would result in a compelled testimonial communication, an outcome neither compatible with the fifth amendment nor consonant with *Fisher*." *In re Grand Jury Empanelled March 19, 1980,* 680 F. 2d 327, 334, 335–336 (CA3 1982).

In addition, the Court of Appeals noted that the Government had had an opportunity to obtain the documents by providing the respondent with statutory immunity, but had declined to do so. It wrote:

> "Finally, the United States argues that the district court erred in not compelling the appellee to produce the subpoenaed documents subject to 'the functional equivalent of use immunity with respect to the act of production.' Under this arrangement, presumably the appellee would turn over the requested records to the Government, which in turn would be obligated not to use the appellee's act of production against him in any way.
>
> "We are unpersuaded by the Government's proposition. As the appellee stresses, although the Government, on a number of occasions, suggested to the district court that there were means by which the appellee's act of production could be immunized, no procedure ever

> was agreed upon and no formal immunization offer under 18 U. S. C. § 6002 or § 6003 was advanced. Given this failure on the part of the Government to identify with particularity the immunity proposal it envisioned, we cannot say that the district court erred in rejecting this approach, especially in view of the court's finding that 'the government can give no assurances that the act of turning over the documents will not constitute incriminating admissions against [the appellee] either before the grand jury or at a subsequent trial.' Appendix at 98; *see United States* v. *Garcia*, 544 F. 2d 681, 685 n. 4 (3d Cir. 1976)." *Id.*, at 337.

This Court's opinion is entirely consistent with both the reasoning of the Court of Appeals and its disposition of the case. This Court agrees that the subpoena directed to respondent should have been quashed—which is all that the judgment we review today contains. Accordingly, the Court of Appeals' judgment should be affirmed.

To the extent that the Court purports to reverse the judgment of the Court of Appeals, I respectfully dissent.

CONSOLIDATED RAIL CORPORATION *v.* DARRONE, ADMINISTRATRIX OF THE ESTATE OF LeSTRANGE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 82–862. Argued November 29, 1983—Decided February 28, 1984

Section 504 of the Rehabilitation Act of 1973 provides that "[n]o . . . handicapped individual . . . shall, solely by reason of his handicap, . . . be subjected to discrimination under any program or activity receiving Federal financial assistance." Section 505(a)(2), which was added to the Act in 1978, makes "available" the "remedies, procedures, and rights" set forth in Title VI of the Civil Rights Act of 1964 (Title VI) for suits under § 504 against "any recipient of Federal assistance." Petitioner was formed under the Regional Rail Reorganization Act to acquire and operate insolvent railroads, and, as authorized by statute, has sold its securities to the United States, the proceeds of which sales are permitted to be used for maintenance of rail properties, capital needs, refinancing of indebtedness, or working capital. Petitioner also received federal funds to provide for reassignment and retraining of railroad workers whose jobs were affected by the reorganization, and now receives federal funds to provide termination allowances to workers who lost their jobs as a result of the reorganization. Respondent's decedent filed suit in Federal District Court against petitioner for violation of his rights under § 504, alleging that while employed as a locomotive engineer by a railroad to which petitioner is the successor in interest, he suffered an accident requiring amputation of his left hand and forearm, and that thereafter the railroad and the petitioner refused to employ him. The District Court granted petitioner's motion for summary judgment on the ground that the decedent had no "standing" to bring a private action under § 504. The court held that § 505(a)(2) had incorporated the limitation in § 604 of Title VI, which provides that employment discrimination is actionable only when the employer receives federal financial assistance the "primary objective" of which is to provide employment, and that the federal assistance to petitioner did not satisfy this "primary objective" test. The Court of Appeals reversed.

Held:

1. The death of respondent's decedent did not moot the case, since it is clear that § 504 authorizes a plaintiff who alleges intentional discrimination (as was done here) to bring an equitable action for backpay. Pp. 630–631.

2. The suit may be maintained even if petitioner receives no federal aid the primary objective of which is to promote employment. Pp. 631–637.

(a) Section 504's language suggests that its bar on employment discrimination should not be limited to programs that receive such federal aid. The legislative history, executive interpretation, and the Rehabilitation Act's purpose to promote and expand employment opportunities for the handicapped all are consistent with this construction. Pp. 631–634.

(b) Nor did Congress intend to enact the "primary objective" requirement of § 604 of Title VI into the Rehabilitation Act when it added § 505(a)(2) to the Act in 1978. Section 505(a)(2)'s language does not incorporate § 604's "primary objective" limitation. Rather, the legislative history reveals that § 505(a)(2) was intended to codify regulations governing enforcement of § 504 that prohibited employment discrimination regardless of the purpose of federal financial assistance. P. 635.

687 F. 2d 767, affirmed.

POWELL, J., delivered the opinion for a unanimous Court.

Harry A. Rissetto argued the cause for petitioner. With him on the briefs were *Dennis J. Morikawa* and *Dennis Alan Arouca*.

Joseph P. Lenahan argued the cause for respondent. With him on the brief were *Jack Greenberg*, *Beth Lief*, and *Eric Schnapper*.

Assistant Attorney General Reynolds argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Lee*, *Deputy Solicitor General Bator*, *Deputy Assistant Attorneys General Cooper* and *Wilkinson*, *John H. Garvey*, *Brian K. Landsberg*, and *Joan A. Magagna*.*

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[*]Robert E. Williams, *Douglas S. McDowell*, and *Edward E. Potter* filed a brief for the Equal Employment Advisory Council as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Council of the Blind et al. by *Arlene Brynne Mayerson;* for the American Federation of State, County and Municipal Employees et al. by *Larry J. Goldberg* and *Marc P. Charmatz;* and for Senator Alan Cranston et al. by *Allen R. Snyder*.

JUSTICE POWELL delivered the opinion of the Court.

This case requires us to clarify the scope of the private right of action to enforce § 504 of the Rehabilitation Act of 1973, 87 Stat. 394, as amended, 29 U. S. C. § 794 (1982 ed.), that prohibits discrimination against the handicapped by federal grant recipients. There is a conflict among the Circuits.

I

The Rehabilitation Act of 1973 establishes a comprehensive federal program aimed at improving the lot of the handicapped. Among its purposes, as originally stated, were to "promote and expand employment opportunities in the public and private sectors for handicapped individuals and to place such individuals in employment." 29 U. S. C. § 701(8). To further these purposes, Congress enacted § 504 of the Act. That section provides:

> "No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

The language of the section is virtually identical to that of § 601 of Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U. S. C. § 2000d, that similarly bars discrimination (on the ground of race, color, or national origin) in federally assisted programs.

In 1978, Congress amended the Rehabilitation Act to specify the means of enforcing its ban on discrimination. In particular, § 505(a)(2), as added, 92 Stat. 2982, 29 U. S. C. § 794a(a)(2) (1982 ed.), made available the "remedies, procedures, and rights set forth in title VI of the Civil Rights Acts of 1964" to victims of discrimination in violation of § 504 of the Act.[1]

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[1] Section 505(a)(2), as set forth in 29 U. S. C. § 794a(a)(2) (1982 ed.), provides in full: "The remedies, procedures, and rights set forth in title VI of

Petitioner, Consolidated Rail Corporation (Conrail), was formed pursuant to Subchapter III of the Regional Rail Reorganization Act of 1973, 87 Stat. 1004, 45 U. S. C. § 701 *et seq.* The Act, passed in response to the insolvency of a number of railroads in the Northeast and Midwest, established Conrail to acquire and operate the rail properties of the insolvent railroads and to integrate these properties into an efficient national rail transportation system. Under § 216 of the Act, 90 Stat. 89, as amended, 45 U. S. C. § 726 (1976 ed. and Supp. V), the United States, acting through the United States Railway Association, purchases debentures and series A preferred stock of the corporation "at such times and in such amounts as may be required and requested by the Corporation," but "in accordance with the terms and conditions . . . prescribed by the Association . . . ." § 726(b)(1). The statute permits the proceeds from these sales to be devoted to maintenance of rail properties, capital needs, refinancing of indebtedness, or working capital. *Ibid.* Under this statutory authorization, Conrail has sold the United States $3.28 billion in securities. See App. A–15.

Conrail also received federal funds under Subchapter V of the Act, now repealed, to provide for reassignment and retraining of railroad workers whose jobs were affected by the reorganization. And Conrail now receives federal funds under § 1143(a) of the Northeast Rail Service Act of 1981, 95 Stat. 662, 45 U. S. C. § 797a (1976 ed., Supp. V), that provides termination allowances of up to $25,000 to workers who lose their jobs as a result of reorganization.

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the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title."

Section 505(a)(1) generally makes available the remedies of Title VII of the Civil Rights Act to persons aggrieved by violation of § 501 of the Rehabilitation Act, which governs the Federal Government's employment of the handicapped.

II

In 1979, Thomas LeStrange filed suit against petitioner for violation of rights conferred by § 504 of the Rehabilitation Act.[2] The complaint alleged that the Erie Lackawanna Railroad, to which Conrail is the successor in interest, had employed the plaintiff as a locomotive engineer; that an accident had required amputation of plaintiff's left hand and forearm in 1971; and that, after LeStrange was disabled, the Erie Lackawanna Railroad, and then Conrail, had refused to employ him although it had no justification for finding him unfit to work.

The District Court, following the decision of *Trageser* v. *Libbie Rehabilitation Center, Inc.*, 590 F. 2d 87 (CA4 1978), cert. denied, 442 U. S. 947 (1979), granted petitioner's motion for summary judgment on the ground that the plaintiff did not have "standing" to bring a private action under § 504. *LeStrange* v. *Consolidated Rail Corporation*, 501 F. Supp. 964 (MD Pa. 1980).[3] In *Trageser*, the Fourth Circuit had held that § 505(a)(2) of the Rehabilitation Act incorporated into that Act the limitation found in § 604 of Title VI, which provides that employment discrimination is actionable only when the employer receives federal financial assistance the "primary objective" of which is "to provide employment." The District Court concluded that the aid provided to petitioner did not satisfy the "primary objective" test.[4]

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[2] Respondent, the administratrix of LeStrange's estate, was substituted as a party before this Court upon the death of LeStrange.

[3] The District Court also dismissed constitutional claims raised by LeStrange.

[4] Under the analysis of *Trageser*, a private plaintiff also may have "standing" to sue for employment discrimination if he can show "that discrimination in employment necessarily causes discrimination against" the intended beneficiaries of the federal aid, even where that aid itself was not intended to further employment. App. to Pet. for Cert. 33. The District Court found as well that this prong of the *Trageser* test was not satisfied here.

The Court of Appeals reversed and remanded to the District Court. *LeStrange* v. *Consolidated Rail Corporation*, 687 F. 2d 767 (CA3 1982). There was no opinion for the court, but all three judges of the panel agreed that the cause of action for employment discrimination under § 504 was not properly limited to situations "where a primary objective of the Federal financial assistance is to provide employment." Judge Bloch, noting that *North Haven Board of Education* v. *Bell*, 456 U. S. 512 (1982), had construed Title IX to create a private cause of action for employment discrimination in all federally funded education programs, concluded that the language and legislative history of § 504 required the same broad construction of that section. Judge Adams, concurring in the judgment, found the result compelled by *North Haven Board of Education* and by the Third Circuit's decision in *Grove City College* v. *Bell*, 687 F. 2d 684 (1982), aff'd, *ante*, p. 555.[5] Judge Weis, concurring, argued that Congress had not intended the Rehabilitation Act to incorporate Title VI's "primary objective" limitation: that limitation was designed to temper the Government's decision to terminate federal funds, a decision that has more drastic consequences for the funded programs than do private suits for individual relief.

We granted certiorari to resolve the conflict among the Circuits and to consider other questions under the Rehabilitation Act.[6] 459 U. S. 1199 (1983). We affirm.

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[5] The Court of Appeals for the Third Circuit had held in *Grove City College* that an entire educational institution is subject to the antidiscrimination provisions of Title IX of the Education Amendments of 1972 if any department of the institution receives federal aid.

[6] Three other Courts of Appeals have agreed substantially with the Fourth Circuit decision in *Trageser*. See *Scanlon* v. *Atascadero State Hospital*, 677 F. 2d 1271 (CA9 1982); *United States* v. *Cabrini Medical Center*, 639 F. 2d 908 (CA2 1981); *Carmi* v. *Metropolitan St. Louis Sewer District*, 620 F. 2d 672 (CA8), cert. denied, 449 U. S. 892 (1980).

III

We are met initially by petitioner's contention that the death of the plaintiff LeStrange has mooted the case and deprives the Court of jurisdiction for that reason.[7] Petitioner concedes, however, that there remains a case or controversy if LeStrange's estate may recover money that would have been owed to LeStrange.[8] Without determining the extent to which money damages are available under § 504, we think it clear that § 504 authorizes a plaintiff who alleges intentional discrimination to bring an equitable action for backpay. The case therefore is not moot.

In *Guardians Assn.* v. *Civil Service Comm'n of New York City*, 463 U. S. 582 (1983), a majority of the Court expressed the view that a private plaintiff under Title VI could recover backpay; and no Member of the Court contended that backpay was unavailable, at least as a remedy for intentional discrimination.[9] It is unnecessary to review here the grounds for this interpretation of Title VI. It suffices to state that we now apply this interpretation to § 505(a)(2), which, as we have noted, provides to plaintiffs under § 504 the remedies set forth in Title VI. Therefore, respondent, having alleged intentional discrimination, may recover backpay in the present § 504 suit.[10]

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[7] In addition, Conrail argued below, and again in its opening brief, that § 504 does not create a private right of action for employment discrimination. This argument was abandoned at page 3 of Conrail's reply brief. See also Tr. of Oral Arg. 13. In view of this concession it is unnecessary to address the question here beyond noting that the courts below relied on *Cannon* v. *University of Chicago*, 441 U. S. 677 (1979), in holding that such a private right exists under § 504.

[8] Petitioner also concedes that respondent, as representative of LeStrange's estate, may assert any right to monetary relief under § 504 that was possessed by LeStrange.

[9] A majority of the Court agreed that retroactive relief is available to private plaintiffs for all discrimination, whether intentional or unintentional, that is actionable under Title VI. JUSTICE MARSHALL, and JUSTICE STEVENS, joined by JUSTICES BRENNAN and BLACKMUN, argued that both prospective and retroactive relief were fully available to Title VI plaintiffs. 463 U. S., at 624–634, 635–639. JUSTICE O'CONNOR agreed that both prospective and retroactive equitable relief were available, while reserving judgment on the question whether there is a private cause of action for damages relief under Title VI. *Id.*, at 612, n. 1. JUSTICE WHITE, joined by JUSTICE REHNQUIST, while contending that only relief ordering future compliance with legal obligations was available in other private actions under Title VI, put aside the situation of the private plaintiff who alleged

IV

A

The Court of Appeals rejected the argument that petitioner may be sued under § 504 only if the primary objective of the federal aid that it receives is to promote employment. Conrail relies particularly on § 604 of Title VI. This section limits the applicability of Title VI to "employment practice[s] . . . where a *primary objective* of the Federal financial assistance is to provide employment" (emphasis added).[11] As noted above, § 505(a)(2) of the Rehabilitation Act, as added in 1978, adopted the remedies and rights provided in Title VI. Accordingly, Conrail's basic position in this case is that

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intentional discrimination. *Id.*, at 597. THE CHIEF JUSTICE and JUSTICE POWELL did not reach the question, as they would have held that petitioners in that case had no private right of action and had not made the showing of intentional discrimination required to establish a violation of Title VI. *Id.*, at 608–611.

[10] Although the legislative history of the 1978 amendments does not explicitly indicate that Congress intended to preserve the full measure of courts' equitable power to award backpay, the few references to the question are consistent with our holding. Congress clearly intended to make backpay available to victims of discrimination by the Federal Government, see S. Rep. No. 95–890, p. 19 (1978); and statements made in relation to subsequent legislation by the Senate Committee on Labor and Human Resources, the Committee responsible for the 1978 amendments, endorse the availability of backpay. S. Rep. No. 96–316, pp. 12–13 (1979).

[11] Section 604 provides in full: "Nothing contained in this title shall be construed to authorize action under this title by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment." 78 Stat. 253, 42 U. S. C. § 2000d–3.

§ 604's limitation was incorporated expressly into the Rehabilitation Act. The decision of the Court of Appeals therefore should be reversed, Conrail contends, as the primary objective of the federal assistance received by Conrail was not to promote employment.

It is clear that § 504 itself contains no such limitation. Section 504 neither refers explicitly to § 604 nor contains analogous limiting language; rather, that section prohibits discrimination against the handicapped under "*any* program or activity receiving Federal financial assistance." And it is unquestionable that the section was intended to reach employment discrimination.[12] Indeed, enhancing employment of the handicapped was so much the focus of the 1973 legislation that Congress the next year felt it necessary to amend the statute to clarify whether § 504 was intended to prohibit other types of discrimination as well. See § 111(a), Pub. L. 93-516, 88 Stat. 1619, amending 29 U. S. C. § 706(6); S. Rep. No. 93-1297, p. 37 (1974).[13] Thus, the language of § 504 sug-

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[12] Congress recognized that vocational rehabilitation of the handicapped would be futile if those who were rehabilitated could not obtain jobs because of discrimination. Employment discrimination thus would have "a profound effect on the provision of relevant and effective [rehabilitation] services." 119 Cong. Rec. 5862 (1973) (remarks of Sen. Cranston). See, *e. g.*, S. Rep. No. 93-318, p. 4 (1973); 119 Cong. Rec. 24587 (1973) (remarks of Sen. Taft); *id.*, at 24588 (remarks of Sen. Williams). Several other sections of Title V of the Rehabilitation Act also were aimed at discrimination in employment: § 501 and § 503 require all federal employers and federal contractors to adopt affirmative-action programs for the handicapped.

[13] We note further that the Court in an analogous statutory context rejected the contention that the terms used in § 504 implicitly contain a "primary objective" limitation. Section 901 of Title IX, like § 504, borrowed the language of § 601 of Title VI. *North Haven Board of Education* v. *Bell*, 456 U. S. 512 (1982), found, however, that Title IX's prohibition of employment discrimination did not incorporate § 604's "primary objective" requirement. The Court stated that, had Congress wished so to limit Title IX, it would have enacted in that Title counterparts to both § 601 and § 604. *Id.*, at 530.

Petitioner suggests that *North Haven* is inapplicable to the construction of § 504 because the Congress considered but rejected a provision explicitly gests that its bar on employment discrimination should not be limited to programs that receive federal aid the primary purpose of which is to promote employment.

The legislative history, executive interpretation, and purpose of the 1973 enactment all are consistent with this construction. The legislative history contains no mention of a "primary objective" limitation, although the legislators on numerous occasions adverted to § 504's prohibition against

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incorporating the language of § 604 of Title VI into Title IX. And other aspects of the legislative history also supported the Court's interpretation of § 901, see *id.*, at 523–529. In contrast, Congress did not advert to a "primary objective" limitation when drafting § 504.

Clearly, petitioner's observations do not touch on that aspect of *North Haven*—its analysis of the language of § 601—that is relevant to the present case. But even without the analysis of *North Haven*, petitioner's interpretation of § 504's language is unfounded. For language as broad as that of § 504 cannot be read in isolation from its history and purposes. See, *e. g.*, *Chapman* v. *Houston Welfare Rights Org.*, 441 U. S. 600, 608 (1979); *Philbrook* v. *Glodgett*, 421 U. S. 707, 713 (1975). In these respects, § 504 differs from Title VI in ways that suggest that § 504 cannot sensibly be interpreted to ban employment discrimination only in programs that receive federal aid the "primary objective" of which is to promote employment. The "primary objective" limitation of Title VI gave the antidiscrimination provision of that Title a scope that well fits its underlying purposes—to ensure that "funds of the United States are not used to support racial discrimination" but "are spent in accordance with the Constitution and the moral sense of the Nation." 110 Cong. Rec. 6544 (1964) (remarks of Sen. Humphrey). As the Court of Appeals observed, it was unnecessary to extend Title VI more generally to ban employment discrimination, as Title VII comprehensively regulates such discrimination.

In contrast, the primary goal of the Act is to increase employment of the handicapped, see *supra*, at 632, and n. 12. However, Congress chose to ban employment discrimination against the handicapped, not by all employers, but only by the Federal Government and recipients of federal contracts and grants. As to the latter, Congress apparently determined that it would require contractors and grantees to bear the costs of providing employment for the handicapped as a *quid pro quo* for the receipt of federal funds. Cf. 118 Cong. Rec. 32305 (1972) (remarks of Sen. Javits). But this decision to limit § 504 to the recipients of federal aid does not require us to limit that section still further, as petitioner urges.

discrimination in employment by programs assisted with federal funds. See, *e. g.*, S. Rep. No. 93–318, pp. 4, 18, 50, 70 (1973); 119 Cong. Rec. 5862 (1973) (remarks of Sen. Cranston); *id.*, at 24587–24588 (remarks of Sen. Williams, Chairman of the Committee on Labor and Public Welfare). Moreover, the Department of Health, Education, and Welfare, the agency designated by the President to be responsible for coordinating enforcement of § 504, see Exec. Order No. 11914, 3 CFR 117 (1977), from the outset has interpreted that section to prohibit employment discrimination by all recipients of federal financial aid, regardless of the primary objective of that aid.[14] This Court generally has deferred to contemporaneous regulations issued by the agency responsible for implementing a congressional enactment. See, *e. g.*, *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 274–275 (1974). The regulations particularly merit deference in the present case: the responsible congressional Committees participated in their formulation, and both these Committees and Congress itself endorsed the regulations in their final form.[15] Finally, application of § 504 to all programs receiving federal financial assistance fits the remedial purpose of the Rehabilitation Act to "promote and expand employment opportunities" for the handicapped. 29 U. S. C. § 701(8).

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[14] See 39 Fed. Reg. 18562, 18582 (1974) (revising pre-existing provisions to implement § 504); 41 Fed. Reg. 29548, 29552, 29563 (1976) (proposed Department regulations), promulgated, 42 Fed. Reg. 22678 (§ 84.2), 22680 (§ 84.11), 22688 ("Employment Practices") (1977); 43 Fed. Reg. 2132, 2138 (1978) (final coordinating regulations).

The Department of Justice, now responsible for coordinating agency implementation of § 504, see Exec. Order No. 12250, 3 CFR 298 (1981), adopted the HEW guidelines, 46 Fed. Reg. 40686 (1981). The Department of Transportation, from which Conrail receives federal aid, also has construed § 504 to prohibit employment discrimination in all programs receiving federal financial assistance. 44 Fed. Reg. 31442, 31468 (1979), codified at 49 CFR pt. 27 (1983). See § 27.31.

[15] See S. Rep. No. 93–1297, p. 25 (1974). In adopting § 505(a)(2) in the amendments of 1978, Congress incorporated the substance of the Department's regulations into the statute. See n. 16, *infra*.

B

Nor did Congress intend to enact the "primary objective" requirement of § 604 into the Rehabilitation Act when it amended that Act in 1978. The amendments, as we have noted, make "available" the remedies, procedures, and rights of Title VI for suits under § 504 against "*any* recipient of Federal assistance." § 505(a)(2), 29 U. S. C. § 794a(a)(2) (1982 ed.). These terms do not incorporate § 604's "primary objective" limitation. Rather, the legislative history reveals that this section was intended to codify the regulations of the Department of Health, Education, and Welfare governing enforcement of § 504, see S. Rep. No. 95–890, p. 19 (1978), that prohibited employment discrimination regardless of the purpose of federal financial assistance.[16] And it would be anomalous to conclude that the section, "designed to enhance the ability of handicapped individuals to assure compliance with [§ 504]," *id.*, at 18, silently adopted a drastic limitation on the handicapped individual's right to sue federal grant recipients for employment discrimination.

V

Section 504, by its terms, prohibits discrimination only by a "program or activity receiving Federal financial assistance." This Court on two occasions has considered the meaning of the terms "program or activity" as used in Title

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[16] The Committee noted: "[T]he regulations promulgated by the Department of Health, Education, and Welfare with respect to procedures, remedies, and rights under § 504 conform with those promulgated under title VI. Thus, this amendment codifies existing practice as a specific statutory requirement." S. Rep. No. 95–890, p. 19 (1978). Although these Department regulations incorporated Title VI regulations governing "complaint and enforcement procedures," see 42 Fed. Reg. 22685, 22694–22701 (1977), the regulations implementing § 504 did not incorporate § 80.3 of the Title VI regulations, which limit Title VI's application to employment discrimination in federal programs to increase employment. The § 504 regulations banned employment discrimination in programs receiving any form of federal financial assistance. See n. 14, *supra*.

IX. *Grove City College* v. *Bell*, *ante*, p. 555; *North Haven Board of Education* v. *Bell*, 456 U. S. 512, 535–540 (1982). Clearly, this language limits the ban on discrimination to the specific program that receives federal funds. Neither opinion, however, provides particular guidance as to the appropriate treatment of the programs before us. *Grove City College* considered grants of financial aid to students. The Court specifically declined to analogize these grants to nonearmarked direct grants and, indeed, characterized them as "*sui generis.*" *Ante*, at 573. *North Haven Board of Education* did not undertake to define the term "program" at all, finding that, in the procedural posture of that case, that task should be left to the District Court in the first instance.[17] 456 U. S., at 540.

The procedural posture of the case before us is the same as that of *North Haven Board of Education.* The District Court granted a motion for summary judgment on grounds unrelated to the issue of "program specificity." That judgment was reversed by the Court of Appeals and the case was remanded for further proceedings. Thus, neither the District Court nor the Court of Appeals below considered the question whether respondent's decedent had sought and been denied employment in a "program . . . receiving Federal financial assistance."[18] Nor did the District Court develop the record or make the factual findings that would be required to define the relevant "program." We therefore do not consider whether federal financial assistance was received by the "program or activity" that discriminated against LeStrange.[19]

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[17] The Court held that the Court of Appeals in that case had erroneously suggested that HEW regulations issued under Title XI to govern employment discrimination need not be program specific. See 456 U. S., at 536.

[18] Although Judge Adams cited the Third Circuit opinion in *Grove City College*, he did so merely to support his rejection of the *Trageser* "standing" analysis. See *supra*, at 629.

[19] Conrail does not contest that it receives federal financial assistance within the meaning of § 504. Apparently, the Government's payments to Conrail exceed the fair market value of the securities issued by Conrail to the Government. Tr. of Oral Arg. 18.

VI

We conclude that respondent may recover backpay due to her decedent under § 504 and that this suit for employment discrimination may be maintained even if petitioner receives no federal aid the primary purpose of which is to promote employment. The judgment of the Court of Appeals is therefore affirmed.

It is so ordered.

SOLEM, WARDEN, SOUTH DAKOTA STATE PENITENTIARY *v.* STUMES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 81-2149. Argued November 28, 1983—Decided February 29, 1984

Respondent, a homicide suspect, when arrested on unrelated charges, made incriminating statements to the police about the homicide after the police had twice renewed interrogation despite respondent's having invoked his right to counsel. Respondent was charged with murder and, after the South Dakota trial court refused to suppress the statements made to the police, was convicted of first-degree manslaughter. The South Dakota Supreme Court affirmed. Respondent then filed a petition for a writ of habeas corpus in Federal District Court, which denied the writ. While respondent's appeal was pending, this Court in *Edwards* v. *Arizona*, 451 U. S. 477, held that once a suspect has invoked the right to counsel, any subsequent conversation must be initiated by him. Applying *Edwards* to this case, the Court of Appeals found that the police had acted unconstitutionally.

Held: Edwards should not be applied retroactively, and therefore the Court of Appeals erred in evaluating the constitutionality of the police conduct in this case under the standards set out in *Edwards*. Pp. 642–651.

(a) The criteria guiding resolution of whether a new constitutional decision should be applied retroactively implicate (1) the purpose to be served by the new standards, (2) the extent law enforcement authorities relied on the old standards, and (3) the effect on the administration of justice of a retroactive application of the new standards. Pp. 642–643.

(b) Complete retroactive effect is most appropriate where a new constitutional principle is designed to enhance the accuracy of criminal trials. *Edwards* has little to do with the truthfinding function of the criminal trial. The fact that a suspect has requested a lawyer does not mean that statements he makes in response to subsequent police questioning are likely to be inaccurate. Moreover, in those situations where renewed interrogation raises significant doubt as to the voluntariness and reliability of the statements and, therefore, the accuracy of the outcome at trial, it is likely that suppression could be achieved without reliance on the prophylactic rule adopted in *Edwards*. Pp. 643–645.

(c) It would be unreasonable to expect law enforcement authorities to have conducted themselves in accordance with *Edwards'* bright-line rule prior to its announcement. *Edwards* did not overrule any prior decision or transform standard practice, but it did establish a new test for when the waiver of right to counsel would be acceptable once the suspect had invoked that right. It cannot be said that the *Edwards* decision had been "clearly" or "distinctly" foreshadowed. Pp. 645–650.

(d) The retroactive application of *Edwards* would have a disruptive effect on the administration of justice. In a significant number of cases, an inquiry, hampered by problems of lost evidence, faulty memory, and missing witnesses, would be required to assess the substantiality of any *Edwards* claim. P. 650.

671 F. 2d 1150, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, REHNQUIST, and O'CONNOR, JJ., joined. POWELL, J., filed an opinion concurring in the judgment, *post*, p. 651. STEVENS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 655.

Mark V. Meierhenry, Attorney General of South Dakota, argued the cause and filed briefs for petitioner.

Timothy J. McGreevy, by appointment of the Court, 464 U. S. 808, argued the cause and filed a brief for respondent.

JUSTICE WHITE delivered the opinion of the Court.

The question in this case is whether *Edwards* v. *Arizona*, 451 U. S. 477 (1981), should be applied retroactively.

I

Respondent, Norman Stumes, was a suspect in the death of Joyce Hoff in Sioux Falls, S. D. On September 27, 1973, Stumes was arrested in Green Bay, Wis., on pending perjury and felony check charges. He had not yet been charged with Hoff's death. The following morning he spoke by phone with his attorney in Sioux Falls, who told him not to make any statements before returning to South Dakota. Three Sioux Falls police officers, Skadsen, Green, and Hendrick, went to Green Bay to bring Stumes back. They first spoke with him on the morning of October 1. After being read his *Miranda* rights, Stumes said that he understood them and did not object to speaking with police without his attorney present. After an hour and a half of conversation about the homicide, Green asked Stumes if he would be willing to take a lie detector test. Stumes answered that "that is a question I'd rather not answer until I talk to [my attorney]." At that point the officers stopped questioning.

The officers returned that afternoon and recommenced questioning without giving *Miranda* warnings. Stumes admitted he had been in Hoff's apartment the night of the killing and that they had had intercourse, but he denied having had anything to do with her death. When asked if the death had been intentional or accidental, Stumes said that it had been accidental. He then stated that "I would rather not talk about it any more at this time until I talk to my attorney, and after that I'll give you a full statement in regards to her death." Questioning thereupon ceased.

The next morning Stumes and the three officers set out, by car, on the 600-mile trip to Sioux Falls. Stumes was given his *Miranda* warnings at the beginning of the trip, and was asked whether he would be willing to talk. He shrugged and nodded affirmatively, and there was then some further questioning. For most of the trip, the conversation was about unrelated matters, though occasionally the subject of Hoff's death came up. Late in the afternoon, after a 10- or 15-minute silence in the car, respondent had what he referred to as "a little conflict with my emotions" and "made the statement that I couldn't understand why anybody would want to kill Joyce and that the taking of a human life is so useless." Green told him he would feel better if he "got it off his chest." Stumes then recounted striking and strangling Hoff after she had said she would tell someone that she and Stumes had slept together. Green asked if Stumes would give the police a statement when they reached Sioux Falls, noting that his attorney would undoubtedly advise him not to. Stumes agreed to give a statement, stating: "I don't give a damn what he says. I'm doing anything I feel like, and I'll talk to anybody I want to." Stumes and the officers reached Sioux Falls at about 6:45 in the evening. Shortly after being placed in a cell, Stumes called for Skadsen, asking him to "tell them that I didn't mean to kill her, that it was an accident—that I'm not a vicious killer."

Stumes was charged with murder; the trial court refused to suppress any of his statements to the police; and the jury found him guilty of first-degree manslaughter and sentenced him to life imprisonment. On direct appeal, the State Supreme Court remanded for a determination whether Stumes' statements had been voluntary. The trial court found that they had; the conviction was accordingly "automatically affirmed." 90 S. D. 382, 241 N. W. 2d 587 (1976).

Stumes then filed this petition for a writ of habeas corpus in the United States District Court for the District of South Dakota. The District Court denied the writ after an evidentiary hearing. It concluded that Stumes had knowingly, intelligently, and voluntarily waived his right to counsel. *Miranda* did not require that all questioning must cease forever once a suspect has requested counsel. 511 F. Supp. 1312 (1981). Given the totality of the circumstances, the questioning during the trip to South Dakota was proper.[1]

While Stumes' appeal was pending, we held that once a suspect has invoked the right to counsel, any subsequent conversation must be initiated by him. *Edwards* v. *Arizona*, *supra*. Applying *Edwards* to this case, the Court of Appeals for the Eighth Circuit found that the police had acted unconstitutionally in twice renewing interrogation after Stumes had invoked his right to counsel. 671 F. 2d 1150 (1982).[2]

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[1] The District Court found that the morning questioning was not unconstitutional. Stumes was informed of his rights and questioning ceased when he requested a lawyer. The court concluded that the afternoon session was unconstitutional because the officers had failed to reinform Stumes of his rights. However, it considered the trial court's error in admitting statements made at that time harmless beyond a reasonable doubt.

[2] The court thought that Stumes' agreement to speak when the police resumed questioning was not a valid waiver. Nor was his comment that taking a human life was useless the initiation of new conversation about the

Petitioner sought a writ of certiorari on three questions: whether the conduct of the police in this case violated *Edwards*, whether the District Court adequately deferred to the state court's factfinding, and whether *Edwards* should be applied retroactively. We granted certiorari only as to the third. 463 U. S. 1228 (1983). We therefore assume for present purposes that the conduct at issue here violated *Edwards*. We need not decide whether the police also violated *Miranda* v. *Arizona*, 384 U. S. 436 (1966), a question not considered by the Court of Appeals. Because we conclude that the court erred in applying *Edwards* to this case, we reverse and remand for reconsideration under pre-*Edwards* law.

II

As a rule, judicial decisions apply "retroactively." *Robinson* v. *Neil*, 409 U. S. 505, 507–508 (1973). Indeed, a legal system based on precedent has a built-in presumption of retroactivity. Nonetheless, retroactive application is not compelled, constitutionally or otherwise. *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 364 (1932). Since *Linkletter* v. *Walker*, 381 U. S. 618 (1965), which held that *Mapp* v. *Ohio*, 367 U. S. 643 (1961), applied only to defendants whose convictions were not yet final when *Mapp* was decided, we have recognized that "the interest of justice" and "the exigencies of the situation" may argue against imposing a new constitutional decision retroactively. 381 U. S., at 628. The basic principles of retroactivity in criminal cases were established in *Linkletter* v. *Walker*,

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homicide, particularly as it came only after he had been questioned intermittently throughout the trip and the actual incriminating statement was prompted by the officer's invitation to "get it off his chest." Finally, the statement to Skadsen at the jail was tainted by the previous, unconstitutionally obtained, incriminating statements. One judge dissented on the ground that Stumes had initiated further communication and made a valid waiver. The court did not consider whether *Edwards* should be applied retroactively.

supra, *Tehan* v. *United States ex rel. Shott*, 382 U. S. 406 (1966), and *Johnson* v. *New Jersey*, 384 U. S. 719 (1966). Under these cases,

> "[t]he criteria guiding resolution of the [retroactivity] question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Stovall* v. *Denno*, 388 U. S. 293, 297 (1967).[3]

Examining *Edwards* in light of these three factors, we conclude that it should not be applied retroactively.

A

Complete retroactive effect is most appropriate where a new constitutional principle is designed to enhance the accuracy of criminal trials. See *Williams* v. *United States*, 401 U. S. 646, 653, and n. 6 (1971) (plurality opinion) (citing cases). The *Edwards* rule has only a tangential relation to truthfinding at trial. As we have noted in the past, "the question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree." *Johnson* v. *New Jersey*, *supra*, at 728–729. The application of the exclusionary rule pursuant to *Edwards* is perhaps not as entirely unrelated to the accuracy of the final result as it is in the Fourth Amendment context. See *United States* v. *Peltier*, 422 U. S. 531 (1975); *Desist* v. *United States*, 394 U. S. 244 (1969). Yet the *Edwards* rule cannot be said to be a *sine qua non* of fair and accurate interrogation. We faced a similar situation in *Stovall* v. *Denno*, *supra*, where we held that the newly established rule that counsel had to be present during lineups was not to be applied retroactively. There we noted that although excluding identifications made in the absence of counsel was "justified by the need to assure the integrity and reliability of our system of justice, [it] undoubtedly will affect cases in which no unfairness will be present." *Id.*, at 299. The same is true of the *Edwards* rule. The fact that a suspect has requested a lawyer does not mean that statements he makes in response to subsequent police questioning are likely to be inaccurate. Most important, in those situations where renewed interrogation raises significant doubt as to the voluntariness and reliability of the statement and, therefore, the accuracy of the outcome at trial, it is likely that suppression could be achieved without reliance on the prophylactic rule adopted in *Edwards*.[4]

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[3] A majority of the Court has recently adopted a slightly different approach in the Fourth Amendment area. *United States* v. *Johnson*, 457 U. S. 537 (1982). Without considering the *Linkletter/Stovall* factors, *Johnson* held that a decision construing the Fourth Amendment that was not a "clear break with the past" is to be applied to all convictions not yet final when the decision was handed down. The Court was careful to note the limits to its holding:

"First, our decision today does not affect those cases that would be clearly controlled by our existing retroactivity precedents. Second, because respondent's case arises on direct review, we need not address the retroactive reach of our Fourth Amendment decisions to those cases that still may raise Fourth Amendment issues on collateral attack. Third, we express no view on the retroactive application of decisions construing any constitutional provision other than the Fourth Amendment." 457 U. S., at 562 (footnotes and citation omitted).

These limitations make *Johnson* inapplicable to this case, which is controlled by prior precedent, arises on collateral review, and does not involve the Fourth Amendment.

We have frequently refused to give retroactive effect to decisions that bore at least as heavily on the truthfinding function. The most notable of these is *Miranda* itself, which was held to apply only to trials taking place after it was decided. *Johnson* v. *New Jersey*, *supra*.[5] See generally *Williams* v. *United States*, *supra*, at 655, n. 7. The *Edwards* rule is a far cry from the sort of decision that goes to the heart of the truthfinding function, which we have consistently held to be retroactive. *E. g.*, *Brown* v. *Louisiana*, 447 U. S. 323 (1980); *Hankerson* v. *North Carolina*, 432 U. S. 233 (1977); *Arsenault* v. *Massachusetts*, 393 U. S. 5 (1968). Rather, it is a prophylactic rule, designed to implement preexisting rights. This Court has not applied such decisions retroactively. See *Michigan* v. *Payne*, 412 U. S. 47 (1973); *Halliday* v. *United States*, 394 U. S. 831 (1969) *(per curiam)*; *Stovall* v. *Denno*, *supra*.

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[4] Like, for example, *Miranda* and *North Carolina* v. *Pearce*, 395 U. S. 711 (1969), *Edwards* did not confer a substantive constitutional right that had not existed before; it "created a protective umbrella serving to enhance a constitutional guarantee." See *Michigan* v. *Payne*, 412 U. S. 47, 54 (1973). Because the "foundational" right was, and remains, available to defendants in pre-*Edwards* cases, "a decision of nonretroactivity is less likely to result in the continued incarceration of those whose convictions . . . rest on unconstitutional acts." 412 U. S., at 54.

B

In considering the reliance factor, this Court's cases have looked primarily to whether law enforcement authorities and state courts have justifiably relied on a prior rule of law said to be different from that announced by the decision whose retroactivity is at issue. Unjustified "reliance" is no bar to retroactivity. This inquiry is often phrased in terms of whether the new decision was foreshadowed by earlier cases or was a "clear break with the past."[6] When the Court has explicitly overruled past precedent, disapproved a practice it has sanctioned in prior cases, or overturned a longstanding practice approved by near-unanimous lower-court authority, the reliance and effect factors in themselves "have virtually compelled a finding of nonretroactivity." *United States* v. *Johnson*, 457 U. S. 537, 549–550 (1982). See also *id.*, at 551–552. We have been less inclined to limit the effect of a decision that has been "distinctly foreshadowed." *Brown* v. *Louisiana*, *supra*, at 336. At just what point of predictability local authorities should be expected to anticipate a future decision has been unclear, however.

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[5] Much of what was said in *Johnson* v. *New Jersey* applies equally to this case:

"[T]he prime purpose of *[Escobedo* and *Miranda]* is to guarantee full effectuation of the privilege against self-incrimination, the mainstay of our adversary system of criminal justice. They are designed in part to assure that the person who responds to interrogation while in custody does so with intelligent understanding of his right to remain silent and of the consequences which may flow from relinquishing it. . . . [W]hile *Escobedo* and *Miranda* guard against the possibility of unreliable statements in every instance of in-custody interrogation, they encompass situations in which the danger is not necessarily as great as when the accused is subjected to overt and obvious coercion.

"At the same time, our case law on coerced confessions is available for persons whose trials have already been completed, providing of course that the procedural prerequisites for direct or collateral attack are met. . . . Prisoners may invoke a substantive test of voluntariness. . . . Thus, while *Escobedo* and *Miranda* provide important new safeguards against the use of unreliable statements at trial, the nonretroactivity of these decisions will not preclude persons whose trials have already been completed from invoking the same safeguards as part of an involuntariness claim." 384 U. S., at 729–730.

See also *Jenkins* v. *Delaware*, 395 U. S. 213, 222 (1969).

Edwards established a bright-line rule to safeguard preexisting rights, not a new substantive requirement. Before and after *Edwards* a suspect had a right to the presence of a lawyer, and could waive that right. *Edwards* established a new test for when that waiver would be acceptable once the suspect had invoked his right to counsel: the suspect had to initiate subsequent communication. Prior to *Edwards* the

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[6] It can be both. A decision that overrules much-criticized precedent may well have been clearly foreshadowed. *Katz* v. *United States*, 389 U. S. 347 (1967), was such a decision. In holding that it was not retrospective, we stated: "However clearly our holding in *Katz* may have been foreshadowed, it was a clear break with the past" because it expressly overruled prior decisions. *Desist* v. *United States*, 394 U. S. 244, 248 (1969). Indeed, the dissent insisted there was nothing new about *Katz*. "*Katz* is not responsible for killing *Olmstead*. Prior cases had left the physical-trespass requirement of *Olmstead* virtually lifeless and merely awaiting the death certificate that *Katz* gave it." 394 U. S., at 275 (Fortas, J., dissenting). Our cases indicate that even in this situation authorities are generally entitled to rely on existing case law, whatever its disrepute.

Court had "strongly indicated that additional safeguards are necessary when the accused asks for counsel," 451 U. S., at 484, and had several times referred to an accused's right to be free from further questioning once he invoked his right to counsel, see *id.*, at 485. *Edwards* did not overrule any prior decision or transform standard practice. Thus, it is not the sort of "clear break" case that is almost automatically nonretroactive.

Edwards nonetheless did establish a new rule. We do not think that the police can be faulted if they did not anticipate its *per se* approach. Cf. *Adams* v. *Illinois*, 405 U. S. 278, 283 (1972) (plurality opinion). Prior to *Edwards*, the emphasis in our cases had been on whether, as an individual, case-by-case matter, a waiver of the right to counsel had been knowing, voluntary, and intelligent. See *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938). As we said in *North Carolina* v. *Butler*, 441 U. S. 369, 374–375 (1979), relying on *Johnson* v. *Zerbst* and treating the Fifth Amendment right to counsel as *a fortiori*, "[e]ven when a right so fundamental as that to counsel at trial is involved, the question of waiver must be determined on 'the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.'" There we saw "no reason to discard that standard and replace it with an inflexible *per se* rule." 441 U. S., at 375. See also *Fare* v. *Michael C.*, 442 U. S. 707, 724–725 (1979). The *Miranda* majority, 384 U. S., at 475, viewed the waiver question as controlled by *Johnson* v. *Zerbst* and was taken to task for that view by one of the dissenters, 384 U. S., at 513–514 (Harlan, J., dissenting). See also *Tague* v. *Louisiana*, 444 U. S. 469, 470–471 (1980); *Michigan* v. *Tucker*, 417 U. S. 433, 444 (1974).[7] It does not in any way cast doubt on the legitimacy or necessity of *Edwards* to acknowledge that in some cases a waiver could be knowing, voluntary, and intelligent even though it occurred when the police recommenced questioning after an accused had invoked the right to counsel. The Court had several times refused to adopt *per se* rules governing the waiver of *Miranda* rights. *Michigan* v. *Mosley*, 423 U. S. 96 (1975); *North Carolina* v. *Butler*, *supra*. See also *Brown* v. *Illinois*, 422 U. S. 590, 603–604 (1975). And, while *Mosley* did distinguish the right to counsel from the right to silence, 423 U. S., at 104, n. 10, much of the logic and language of the opinion could be applied to the invocation of the former. *Edwards* was not a necessary consequence of *Miranda*. Thus it could be justifiably believed that a waiver of the right to counsel following its invocation could be voluntary even if the police initiated the conversation.

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[7] JUSTICE STEVENS nonetheless asserts that "[i]n *Miranda* the Court specifically rejected case-by-case inquiry into whether there was a knowing, voluntary, and intelligent waiver of Fifth Amendment rights, opting for a prophylactic rule that eschewed case-by-case inquiry." *Post*, at 661, n. 7. As the very quotation on which JUSTICE STEVENS relies demon-

The state of the law in the lower courts prior to the *Edwards* decision bears out this reality. Cf. *Michigan* v. *Payne*, 412 U. S., at 56. Before *Edwards*, the question whether the authorities could resume questioning after a defendant has asked for an attorney was acknowledged to be unsettled. See *United States* v. *Hernandez*, 574 F. 2d 1362, 1370, n. 16 (CA5 1978); *United States* v. *Herman*, 544 F. 2d 791, 796, n. 8 (CA5 1977). Some courts prohibited resumption of questioning unless initiated by the suspect. *E. g.*, *United States* v. *Womack*, 542 F. 2d 1047, 1050–1051 (CA9 1976); *United States* v. *Priest*, 409 F. 2d 491, 493 (CA5 1969). On the other hand, a number of courts allowed renewed interrogations after a request for counsel. *E. g.*, *Blasingame* v. *Estelle*, 604 F. 2d 893 (CA5 1979); *White* v. *Finkbeiner*, 611 F. 2d 186, 191 (CA7 1979), vacated and remanded, 451

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strates, however, *Miranda*'s *per se* rule extended no further than requiring that the now-famous warnings be given in every case, regardless of the individual circumstances. *Miranda* did not adopt a *per se* rule with regard to waiver of the right to counsel. See 384 U. S., at 475–476. That development awaited *Edwards*.

U. S. 1013 (1981); *United States* v. *Rodriguez-Gastelum*, 569 F. 2d 482, 488 (CA9) (en banc), cert. denied, 436 U. S. 919 (1978); *Hill* v. *Whealon*, 490 F. 2d 629 (CA6 1974). See also *United States* v. *Clark*, 499 F. 2d 802, 807 (CA4 1974).[8]

In *Johnson* v. *New Jersey*, we declined to measure the prospectivity of *Miranda* from the date of *Escobedo* v. *Illinois*, 378 U. S. 478 (1964), because it had not been "fully anticipated" or "clearly foreshadowed" by that decision. 384 U. S., at 734. "The disagreements among other courts concerning the implications of *Escobedo*, however, have impelled us to lay down additional guidelines for situations not presented by that case. This we have done in *Miranda* and these guidelines are therefore available only to persons whose trials had not begun" when *Miranda* was decided. 384 U. S., at 734 (footnote omitted). The same logic argues against retroactive application of *Edwards*, which, in light of the disagreements among lower courts, laid down additional guidelines for the implementation of *Miranda*.

In short, it cannot be said that our decision in *Edwards* had been "clearly" or "distinctly" foreshadowed. See *Adams* v. *Illinois*, *supra*, at 283. Cf. *Brown* v. *Louisiana*, 447 U. S., at 336. In these circumstances, we consider the reliance interest compelling, even though *Edwards* did not overrule a specific decision.

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[8] As JUSTICE STEVENS points out, a dozen state courts had excluded evidence obtained under similar circumstances. See *post*, at 663, n. 9. The rulings of the state courts were not as one-sided as he implies, however. Among cases upholding reinterrogation of a suspect who had asserted his right to counsel are *Ladd* v. *State*, 568 P. 2d 960, 966, n. 8 (Alaska 1977), cert. denied, 435 U. S. 928 (1978); *State* v. *Greenawalt*, 128 Ariz. 150, 158–160, 624 P. 2d 828, 836–838, cert. denied, 454 U. S. 882 (1981); *Brown* v. *United States*, 359 A. 2d 600, 601–602 (D. C. 1976); *State* v. *Stone*, 397 A. 2d 989, 994–995 (Me. 1979); *State* v. *Greene*, 91 N. M. 207, 212–213, 572 P. 2d 935, 940–941 (1977); *Commonwealth* v. *Jefferson*, 445 Pa. 1, 5–6, 281 A. 2d 852, 854–855 (1971); *Sweiberg* v. *State*, 511 S. W. 2d 50 (Tex. Crim. App. 1974) (and cases cited); *Nash* v. *State*, 477 S. W. 2d 557, 560–563 (Tex. Crim. App.), cert. denied, 409 U. S. 887 (1972); *State* v. *Pierce*, 94 Wash. 2d 345, 350–352, 618 P. 2d 62, 65–66 (1980) (remanding for further factfinding).

C

The retroactive application of *Edwards* would have a disruptive effect on the administration of justice. We can only guess at the number of cases where *Edwards* might make a difference in the admissibility of statements made to the police, but the number is surely significant. In all of those, some inquiry would be required to assess the substantiality of any *Edwards* claim. That investigation, and the possible retrial, would be hampered by problems of lost evidence, faulty memory, and missing witnesses. See *Jenkins* v. *Delaware*, 395 U. S. 213, 220–221 (1969).

D

In sum, *Edwards* has little to do with the truthfinding function of the criminal trial, and the rights it is designed to protect may still be claimed by those whose convictions preceded the decision. It would be unreasonable to expect law enforcement authorities to have conducted themselves in accordance with its bright-line rule prior to its announcement; and retroactive application would disrupt the administration of justice. Weighing these considerations, we conclude that *Edwards* should not be applied retroactively.

III

At a minimum, nonretroactivity means that a decision is not to be applied in collateral review of final convictions. For purposes of this case, that is all we need decide about *Edwards*.[9] Our prior cases have drawn the nonretroactivity line in a variety of places. Some decisions have been applied only to defendants whose convictions were not yet final when the new rule was established, *United States* v. *Johnson*, 457 U. S. 537 (1982); *Linkletter* v. *Walker*, 381 U. S. 618 (1965), some only to those defendants whose trials had not yet begun at that point, *Johnson* v. *New Jersey*, 384 U. S. 719 (1966); *DeStefano* v. *Woods*, 392 U. S. 631 (1968), some only to those whose constitutional rights were violated after the law-changing decision was handed down, *United States* v. *Peltier*, 422 U. S. 531 (1975); *Desist* v. *United States*, 394 U. S. 244 (1969); *Stovall* v. *Denno*, 388 U. S. 293 (1967), and some only to those cases where the prosecution sought to introduce (newly) illegal evidence after the date of the nonretroactive decision, *Fuller* v. *Alaska*, 393 U. S. 80 (1968). Just where the line should be drawn as to *Edwards* need not be decided today.

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[9] In *Wyrick* v. *Fields*, 459 U. S. 42 (1982) *(per curiam)*, a federal habeas action, we reversed the determination of the Court of Appeals that the police conduct in that case violated *Edwards*. We did not consider whether *Edwards* applied in such circumstances, nor did we have to, because even if it did the lower court had erred on the merits. That decision cannot be read as a holding that *Edwards* should be applied retroactively to cases on

IV

The Court of Appeals erred by evaluating the constitutionality of the police conduct in this case under the standards set out in *Edwards*. We express no opinion as to whether the conduct of the police in this case was acceptable under prior cases from this Court or the Eighth Circuit, and remand to the Court of Appeals for that determination.

Reversed and remanded.

JUSTICE POWELL, concurring in the judgment.

In *Edwards* v. *Arizona*, 451 U. S. 477 (1981), this Court determined that the accused's waiver of his right to counsel

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collateral review. For the same reasons, of course, *Oregon* v. *Bradshaw*, 462 U. S. 1039 (1983), should not be read as holding that *Edwards* applies on direct review to interrogations occurring before it was decided. The questioning involved there occurred nine months before *Edwards* was decided. On direct appeal, the Oregon Court of Appeals held that, in light of *Edwards*, the statements should have been suppressed. We reversed because the state court had misread *Edwards*. The retroactivity of *Edwards* was not considered.

during custodial interrogation was involuntary because he was subjected to renewed interrogation without counsel present after having invoked that right. It was uncertain at the time whether the Court merely intended to apply *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938), that had held that waivers of counsel are effective only if they are "an intentional relinquishment or abandonment of a known right or privilege," a determination made by reference to "the particular facts and circumstances surrounding [each] case, including the background, experience, and conduct of the accused." See 451 U. S., at 482. Alternatively, *Edwards* could have been interpreted as establishing a new *per se* rule that, once the right to counsel has been invoked, a waiver of that right, however voluntary under the *Zerbst* standard, can never be valid if made in response to further police questioning. See *Edwards*, *supra*, at 488–490 (POWELL, J., concurring in result). Confusion as to the proper interpretation of *Edwards* persisted in subsequent cases. See, *e. g.*, *Oregon* v. *Bradshaw*, 462 U. S. 1039 (1983); *id.*, at 1047, n. 1 (POWELL, J., concurring in judgment) (citing lower court cases). The Court now states clearly, relying in part on *Bradshaw*, that *Edwards* established a new *per se* rule and to that extent overruled *Johnson* v. *Zerbst*, *supra*.[1] *Ante*, at 647–648.

This acknowledgment suffices, in my view, to resolve the issue posed by the present case. I previously have urged the Court to adopt Justice Harlan's suggestion that a new rule of constitutional law should be applied only to review of criminal convictions not yet final when the rule is announced.[2] *Hankerson* v. *North Carolina*, 432 U. S. 233, 246–248 (1977) (concurring in judgment). As Justice Harlan reasoned in *Mackey* v. *United States*, 401 U. S. 667, 675–695 (1971) (concurring in judgments in part and dissenting in part), that approach follows directly from a proper conception of the scope of the writ of habeas corpus, as contrasted to direct review. A brief review of the reasons for that approach relevant to the present case will explain why I do not join the Court's opinion.

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[1] In *Edwards*, although concurring in the judgment, I expressed concern as to whether there was an intent to overrule *Zerbst*. See 451 U. S., at 491–492. In *Bradshaw*, last Term, in an opinion also concurring only in the judgment, I reiterated my conviction that the Constitution requires no *per se* rule on an issue as purely factual as whether and when a valid waiver of counsel occurs. 462 U. S., at 1049–1051. As the contrasting opinions of JUSTICES MARSHALL and REHNQUIST in *Bradshaw* illustrate, even the new *per se* rule is more likely to confuse than to clarify. See *id.*, at 1048 (POWELL, J., concurring in judgment). Nevertheless, I now, of course, accept *Edwards* and *Bradshaw* as binding authority.

Retroactive application on habeas corpus of constitutional rules governing criminal procedure is unnecessary to advance the purposes of habeas corpus, even under a regime that permits the federal courts on habeas to vacate a final conviction on any properly preserved ground of federal constitutional error. Review on habeas to determine that the conviction rests upon correct application of the law in effect at the time of the conviction is all that is required to "forc[e] trial and appellate courts . . . to toe the constitutional mark."[3] *Id.*, at 687. Nor will fundamental fairness require complete retroactivity, except in rare instances.[4] Because retroactive application of new rules of constitutional law generally does little to advance the purposes of collateral relief on habeas, it is particularly difficult in such cases to justify imposing upon the State the costs of collateral review. These are not insubstantial. They include "the burden on judicial and prosecutorial resources entailed in retrial" and "the miscarriage of justice that occurs when a guilty offender is set free only because effective retrial is impossible years after the offense." *Hankerson* v. *North Carolina*, *supra*, at 247. Retroactive application of constitutional rules frustrates the State's enforcement of its criminal law despite the State's careful adherence to the federal constitutional standards that governed at the time of the prisoner's conviction.

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[2] The Court adopted this view in *United States* v. *Johnson*, 457 U. S. 537 (1982), to the extent of holding that new rules of Fourth Amendment law would be applied to all convictions not yet final when the rule was announced.

[3] Although it might seem desirable perpetually to revise past convictions in light of evolving legal doctrine, the attempt to do so is fundamentally at odds with the rule of law. "At some point, the criminal process, if it is to function at all, must turn its attention from whether a man ought properly to be incarcerated to how he is to be treated once convicted. If law, criminal or otherwise, is worth having and enforcing, it must at some time provide a definitive answer to the questions litigants present or else it never provides an answer at all." *Mackey* v. *United States*, 401 U. S., at 690–691 (opinion of Harlan, J.). See also *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 262 (1973) (POWELL, J., concurring).

[4] We should give retroactive effect on habeas to decisions announcing rules of criminal procedure required to ensure fundamental fairness, *e. g.*, *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), or holding conduct entirely

The costs imposed upon the State by retroactive application of new rules of constitutional law on habeas corpus thus generally far outweigh the benefits of this application. It is therefore unnecessary to consider the *Linkletter/Stovall* factors, as these were intended merely to guide the Court's balancing of the costs and benefits that accrue from retroactive application of a particular rule.

Certainly the *per se* test adopted in *Edwards* is not a rule necessary to assure fundamental fairness. As the Court's opinion states, "in those situations where renewed interrogation raises significant doubt as to the voluntariness and reliability of the statement and, therefore, the accuracy of the outcome at trial, it is likely that suppression could be achieved without reliance on the prophylactic rule adopted in *Edwards*." *Ante*, at 644.

For these reasons, I concur in the judgment.

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immune from criminal punishment, *e. g.*, *Roe* v. *Wade*, 410 U. S. 113 (1973). Releasing on habeas prisoners who have been convicted by fundamentally unfair procedures, or who have committed no constitutionally punishable offense at all, would give effect to our decisions in those rare cases where a conviction fully in accord with the law governing at the time of conviction is nonetheless plainly unjust. See *Mackey* v. *United States*, *supra*, at 692–693.

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

Respondent Stumes is an acknowledged lawbreaker. His confession, together with other evidence of his guilt, brands him as such. Whether his incarceration for the past dozen or more years is adequate or insufficient punishment for his crime is a matter of no concern to this Court. What is—or should be—of concern is the conduct of other lawbreakers.

While respondent was in custody, and after he had requested the assistance of counsel, the police interrogated him on two separate occasions. As the Court held in *Edwards* v. *Arizona*, 451 U. S. 477 (1981), such interrogation is unlawful. There is no dispute in this Court that respondent's constitutional rights were violated.[1] Nevertheless, because the unlawful interrogation took place prior to May 18, 1981, the date *Edwards* was decided, the Court holds that respondent's statements are admissible in evidence even though they would have been inadmissible if they had been made after May 18, 1981. In reaching this result, the Court states that the question is whether *Edwards* "should be applied retroactively," *ante*, at 639, and then answers the question in the negative because *Edwards* established a "new rule." *Ante*, at 647.

The "new rule" that should concern the Court is the one it announces today, rather than the rule that was applied in *Edwards*. For it was well settled long before *Edwards* was decided that police may not interrogate a prisoner after he has asked for the assistance of a lawyer. The case therefore does not present any real "retroactivity" question. It does, however, raise a serious question concerning this Court's use of its power to create new rules of law.

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[1] This Court limited its grant of certiorari in this case to the question of whether *Edwards* "should be applied retroactively" to this case. *Ante*, at 642. Therefore, the holding of the Court of Appeals that the police conduct in this case violated respondent's rights under the Fifth Amendment is not at issue here, and must be taken as a given.

I

In 1966 the Court decided to "secure scrupulous observance of the traditional principle, often quoted but rarely heeded to the full degree, that 'the law will not suffer a prisoner to be made the deluded instrument of his own conviction.'" *Johnson* v. *New Jersey*, 384 U. S. 719, 730 (1966). Specifically, in *Miranda* v. *Arizona*, 384 U. S. 436 (1966), the Court decided that an individual must be warned prior to custodial interrogation that he has the right to remain silent, the right to have an attorney present during questioning, and the right to have an attorney appointed to represent him free of charge if he cannot afford one. See *id.*, at 467–473. The Court also noted that once an individual requests the presence of an attorney during questioning, "such [a] request *affirmatively secures* his right to have one" during questioning, *id.*, at 470 (emphasis supplied). "If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking *there can be no questioning.*" *Id.*, at 444–445 (emphasis supplied). The Court elaborated:

> "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. *If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent ques-*

> *tioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.*
>
> "This does not mean, as some have suggested, that each police station must have a 'station house lawyer' present at all times to advise prisoners. It does mean, however, that if police propose to interrogate a person they must make known to him that he is entitled to a lawyer and that if he cannot afford one, a lawyer will be provided for him prior to any interrogation. If authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may refrain from doing so without violating the person's Fifth Amendment privilege so long as they do not question him during that time." *Id.*, at 473–474 (emphasis supplied) (footnote omitted).

This language is clear and mandatory. The police "must respect" an individual's request that he be permitted to consult with an attorney prior to custodial interrogation; interrogation "must cease until an attorney is present." Indeed, this language forbids the police even to ask if the individual wishes to waive his rights, since "there can be no questioning." Here respondent made a request to consult with counsel prior to questioning, but the police questioned him anyway, without affording him that opportunity. There is simply nothing in the *Miranda* opinion that gave the police the slightest reason to believe such conduct was permissible.[2]

Even before *Edwards*, this Court had consistently read *Miranda* to impose an absolute obligation on the police to respect an individual's request for counsel. In *Michigan* v.

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[2] One significant omission from the opinion of the Court is any claim that there is language in *Miranda* that could have led police to believe that they *could* interrogate an individual after he had requested an opportunity to confer with counsel. The omission is understandable; there is no such language.

Mosley, 423 U. S. 96 (1975), the Court held that police may question an individual after he invokes his right to remain silent only if his right to cut off questioning is scrupulously honored. However, the Court expressly distinguished the invocation of the right to consult with counsel from the assertion of the right to remain silent, see *id.*, at 101, n. 7, and explained that this distinction came from *Miranda* itself:

> "The dissenting opinion asserts that *Miranda* established a requirement that once a person has indicated a desire to remain silent, questioning may be resumed only when counsel is present. But clearly the Court in *Miranda* imposed no such requirement, for it distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney and directed that 'the interrogation must cease until an attorney is present' only '[i]f the individual states that he wants an attorney.'" 423 U. S., at 104, n. 10 (citations omitted).[3]

Similarly, in *Fare* v. *Michael C.*, 442 U. S. 707 (1979), the Court observed that *Miranda* created a "*per se*" rule that upon a request for counsel, interrogation must cease until counsel is provided. See 442 U. S., at 717–719.[4]

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[3] In his opinion concurring in the result, JUSTICE WHITE added:

"The question of the proper procedure following expression by an individual of his desire to consult counsel is not presented in this case. It is sufficient to note that the reasons to keep the lines of communication between the authorities and the accused open when the accused has chosen to make his own decisions are not present when he indicates instead that he wishes legal advice with respect thereto. More to the point, the accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism." 423 U. S., at 110, n. 2.

[4] The Court elaborated:

"The *per se* aspect of *Miranda* was thus based on the unique role the lawyer plays in the adversary system of criminal justice in this coun-

The *Edwards* opinion itself demonstrates the error in the conclusion the Court reaches today. After acknowledging the *per se* aspect of *Miranda*,[5] the Court explained how its holding was derived directly from *Miranda:*

> "*Miranda* itself indicated that the assertion of the right to counsel was a significant event and that once exercised by the accused, 'the interrogation must cease until an attorney is present.' 384 U. S., at 474. Our later cases have not abandoned that view. In *Michigan* v. *Mosley*, 423 U. S. 96 (1975), the Court noted that *Miranda* had distinguished between the procedural safeguards triggered by a request to remain silent and a request for an attorney and had required that interrogation cease until an attorney was present only if the individual stated that he wanted counsel. 423 U. S., at 104, n. 10; see also *id.*, at 109–111 (WHITE, J., concurring). In *Fare* v. *Michael C.*, *supra*, at 719, the Court referred

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try. Whether it is a minor or an adult who stands accused, the lawyer is the one person to whom society as a whole looks as the protector of the legal rights of that person in his dealings with the police and the courts. For this reason, the Court fashioned in *Miranda* the rigid rule that an accused's request for an attorney is *per se* an invocation of his Fifth Amendment rights, requiring that all interrogation cease." 442 U. S., at 719.

[5] "In *Miranda* v. *Arizona*, the Court determined that the Fifth and Fourteenth Amendments' prohibition against compelled self-incrimination required that custodial interrogation be preceded by advice to the putative defendant that he has the right to the presence of an attorney. 384 U. S., at 479. The Court also indicated the procedures to be followed subsequent to the warnings. If the accused indicates that he wishes to remain silent, 'the interrogation must cease.' If he requests counsel, 'the interrogation must cease until an attorney is present.' *Id.*, at 474.

"*Miranda* thus declared that an accused has a Fifth and Fourteenth Amendment right to have counsel present during custodial interrogation. Here, the critical facts as found by the Arizona Supreme Court are that Edwards asserted his right to counsel and his right to remain silent on January 19, but that the police, without furnishing him counsel, returned the next morning to confront him and as a result of the meeting secured incriminating oral admissions." 451 U. S., at 481–482.

to *Miranda*'s 'rigid rule that an accused's request for an attorney is *per se* an invocation of his Fifth Amendment rights, requiring that all interrogation cease.' And just last Term, in a case where a suspect in custody had invoked his *Miranda* right to counsel, the Court again referred to the 'undisputed right' under *Miranda* to remain silent and to be free of interrogation 'until he had consulted with a lawyer.' *Rhode Island* v. *Innis*, 446 U. S. 291, 298 (1980). *We reconfirm these views and, to lend them substance, emphasize that it is inconsistent with Miranda and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel.*" 451 U. S., at 485 (emphasis supplied).[6]

Because *Edwards* itself makes it perfectly clear that the rule that was reconfirmed in that case had been part of our law ever since *Miranda* was decided in 1966, I find no merit in the Court's reasoning. The fact that some police departments may have failed to heed the plain language of the *Miranda* opinion certainly is not a justification for reaching the conclusion that the reconfirmation of what was said in *Miranda* should be regarded as a new constitutional rule.

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[6] If *Edwards* contains any innovation, it is one favorable to the police. While the language of *Miranda* is mandatory, indicating that no interrogation can take place until the individual has conferred with a lawyer, *Edwards* makes it clear that this language does not extend to a conversation between the authorities and the individual initiated by the latter:

"In concluding that the fruits of the interrogation initiated by the police on January 20 could not be used against Edwards, we do not hold or imply that Edwards was powerless to countermand his election or that the authorities could in no event use any incriminating statements made by Edwards prior to his having access to counsel. Had Edwards initiated the meeting on January 20, nothing in the Fifth or Fourteenth Amendments would prohibit the police from merely listening to his voluntary, volunteered statements and using them against him at the trial. The Fifth Amendment right identified in *Miranda* is the right to have counsel present at any custodial interrogation. Absent such interrogation, there would have been no infringement of the right that Edwards invoked and there would be no occasion to determine whether there had been a valid waiver." 451 U. S., at 485–486.

II

The "retroactivity" analysis of today's majority merits separate scrutiny. The majority makes no attempt to define a "new rule" that gives rise to a retroactivity question, but merely assumes that *Edwards* created one. *Ante*, at 642–643. Its reasoning for treating *Edwards* as having created a "new rule" is implicit, however, in its discussion of what it calls the "reliance factor"—the authorities' reliance on the "prior rule." The Court states that the police could not be faulted for failing to anticipate *Edwards*, since prior law could have been understood to permit a case-by-case evaluation of whether a suspect's decision to speak with police despite an earlier invocation of the right to consult with counsel was a knowing, voluntary, and intelligent waiver of that right.[7] The majority concludes that *Edwards* can be con-

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[7] There is reason to question the majority's reading of "prior" law. The Court cites only three of our cases as supporting a case-by-case approach. The first, *Michigan* v. *Mosley*, 423 U. S. 96 (1975), in fact points in the opposite direction, as the discussion in Part I, *supra*, demonstrates. The second is *Johnson* v. *Zerbst*, 304 U. S. 458 (1938). Of course, *Zerbst* was decided long before *Miranda* and hence places no gloss on it. *Zerbst* was also a case decided under the Sixth Amendment, and the policies underlying the Fifth and Sixth Amendments are quite distinct, as this Court has often pointed out in rejecting reliance on Sixth Amendment precedent in Fifth Amendment contexts and vice versa. See *Estelle* v. *Smith*, 451 U. S. 454, 470, n. 14 (1981); *United States* v. *Henry*, 447 U. S. 264, 272, 273–274, n. 11 (1980); *Rhode Island* v. *Innis*, 446 U. S. 291, 300, n. 4 (1980); *United States* v. *Wade*, 388 U. S. 218, 223–227 (1967). The third, *North Carolina* v. *Butler*, 441 U. S. 369 (1979), did not concern the *per se* aspect of *Miranda*—there the accused had not invoked his right to consult with counsel. Moreover, *Miranda* itself was inconsistent with the case-by-case waiver inquiry of *Zerbst*. In *Miranda*, the Court specifically rejected case-by-case inquiry into whether there was a knowing, voluntary, and intelligent waiver of Fifth Amendment rights, opting for a prophylactic rule that eschewed case-by-case inquiry:

"The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the sidered as announcing a new rule because the law prior to *Edwards* was "unsettled," and cites as evidence the fact that some lower courts had disagreed as to the correct interpretation of *Miranda*. *Ante*, at 648–649.

This approach to defining a "new rule" for retroactivity purposes is completely unprecedented. The majority concedes that *Edwards* was not a "clear break" with the past, *ante*, at 646–647, yet that sort of change in the law has normally been required before a retroactivity question is even raised. For example, in *Desist* v. *United States*, 394 U. S. 244 (1969), the Court wrote: "However clearly our holding in *Katz* [v. *United States*, 389 U. S. 347 (1967),] may have been foreshadowed, it was a clear break with the past, and we are thus compelled to decide whether its application should be limited to the future." *Id.*, at 248.[8] The fact that the position ultimately rejected by this Court had been previously accepted in some but not all lower courts has never been sufficient to demonstrate that a new rule has been created. *United*

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availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact. More important, whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time." 384 U. S., at 468–469 (footnote omitted).

[8] See *Brown* v. *Louisiana*, 447 U. S. 323, 335–336 (1980) (plurality opinion); *Michigan* v. *Payne*, 412 U. S. 47, 55 (1973); *Adams* v. *Illinois*, 405 U. S. 278, 283 (1972); *Chevron Oil Co.* v. *Huson*, 404 U. S. 97, 106 (1971); *Johnson* v. *New Jersey*, 384 U. S. 719, 731 (1966). In fact, in *Johnson*, on which the Court relies, *ante*, at 649, the Court noted that *Miranda* should not be applied retroactively because it involved police practices that this Court had explicitly declined to condemn in the past. In *Stovall* v. *Denno*, 388 U. S. 293 (1967), the Court rejected retroactive application when police practices that had been unanimously upheld by the lower courts prior to this Court's decision were at issue. *Id.*, at 299–300.

States v. *Estate of Donnelly*, 397 U. S. 286, 295 (1970). Until today it had been clear that no retroactivity arises when a decision is based on principles previously announced by this Court, even though there is no precedent squarely on point. *Henderson* v. *Morgan*, 426 U. S. 637, 651–652 (1976) (WHITE, J., concurring). That the principles governing the decision in *Edwards* were well recognized before that case was decided is amply demonstrated by the host of cases that had previously condemned the police practices at issue.[9]

The curious character of the Court's new conception of a "new rule" is well illustrated by *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481 (1968). There the question was whether this Court's endorsement of a rule of antitrust law which had previously been followed only by the Court of Appeals for the Second Circuit constituted the promulgation of a new rule for retroactivity purposes. The Court held that it did not:

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[9] See, *e. g.*, *Thompson* v. *Wainwright*, 601 F. 2d 768 (CA5 1979); *United States* v. *Massey*, 550 F. 2d 300, 307–308 (CA5 1977); *United States* v. *Womack*, 542 F. 2d 1047, 1050–1051 (CA9 1976); *United States* v. *Clark*, 499 F. 2d 802, 807 (CA4 1974); *United States* v. *Crisp*, 435 F. 2d 354, 357 (CA7 1970); *United States* v. *Priest*, 409 F. 2d 491 (CA5 1969); *Moore* v. *State*, 261 Ark. 274, 278, 551 S. W. 2d 185, 187 (1977); *Webb* v. *State*, 258 Ark. 95, 522 S. W. 2d 406 (1975); *Davis* v. *State*, 243 Ark. 157, 419 S. W. 2d 125 (1967); *People* v. *Brake*, 191 Colo. 390, 397–399, 553 P. 2d 763, 770 (1976); *People* v. *Harris*, 191 Colo. 234, 552 P. 2d 10 (1976); *People* v. *Salazar*, 189 Colo. 429, 433–434, 541 P. 2d 676, 680 (1975); *People* v. *Medina*, 71 Ill. 2d 254, 260–261, 375 N. E. 2d 78, 80 (1978); *People* v. *Cook*, 78 Ill. App. 3d 695, 697–698, 397 N. E. 2d 439, 441 (1979); *Stevens* v. *State*, 265 Ind. 396, 404, 354 N. E. 2d 727, 733 (1976); *Pirtle* v. *State*, 263 Ind. 16, 23–25, 323 N. E. 2d 634, 637–639 (1975); *State* v. *Boone*, 220 Kan. 758, 767–768, 556 P. 2d 864, 873 (1976); *State* v. *Crisler*, 285 N. W. 2d 679 (Minn. 1979); *Murphy* v. *State*, 336 So. 2d 213 (Miss. 1976), cert. denied, 429 U. S. 1076 (1977); *State* v. *Nash*, 119 N. H. 728, 407 A. 2d 365 (1979); *Commonwealth* v. *Mercier*, 451 Pa. 211, 302 A. 2d 337 (1973). See also *People* v. *Bowers*, 45 App. Div. 2d 241, 357 N. Y. S. 2d 563 (1974) (police can ask suspect to reconsider decision to consult with counsel but nothing else); *State* v. *Turner*, 32 Ore. App. 61, 573 P. 2d 326 (1978) (police can ask suspect to reconsider decision to consult with counsel but nothing else); *State* v. *Arpan*, 277 N. W. 2d 597 (S. D. 1979) (suspect must be given a reasonable opportunity to consult with counsel); *State* v. *Marcum*, 24 Wash. App. 441, 601 P. 2d 975 (1979) (waiver can only exist where suspect initiates conversation).

> "Like the Court of Appeals, this Court relies for its conclusions upon existing authorities. These cases make it clear that there was no accepted interpretation of the Sherman Act which conditioned a finding of monopolization under § 2 of the Sherman Act upon a showing of predatory practices by the monopolist. In neither case was there such an abrupt and fundamental shift in doctrine as to constitute an entirely new rule which in effect replaced an older one. Whatever development in antitrust law was brought about was based to a great extent on existing authorities and was an extension of doctrines which had been growing and developing over the years. These cases did not constitute a sharp break in the line of earlier authority or an avulsive change which caused the current of the law thereafter to flow between new banks. We cannot say that prior to those cases potential antitrust defendants would have been justified in thinking that then current antitrust doctrines permitted them to do all acts conducive to the creation or maintenance of a monopoly, so long as they avoided direct exclusion of competitors or other predatory acts." *Id.*, at 497–499 (footnotes omitted).[10]

The same analysis clearly indicates that *Edwards* did not create a new rule under the majority's own description of that case. *Edwards* did not constitute a fundamental shift in the law. As the Court appears to recognize, it was at most a modest extension of existing doctrine. The majority's approach is inconsistent with *Hanover Shoe*.

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[10] The Court added that there could be no "new rule" when it could not be said that there was a "well-defined interpretation of the Sherman Act which was abruptly overruled . . . or that United's leasing system could not be considered an instrument for the exercise and maintenance of monopoly power." 392 U. S., at 502.

Less than two years ago the Court considered whether our holding in *Payton* v. *New York*, 445 U. S. 573 (1980), that the Fourth Amendment prohibits warrantless arrests of persons in their homes was the announcement of a "new" rule of law. We wrote:

> "*Payton* also did not announce an entirely new and unanticipated principle of law. In general, the Court has not subsequently read a decision to work a 'sharp break in the web of the law,' unless that ruling caused 'such an abrupt and fundamental shift in doctrine as to constitute an entirely new rule which in effect replaced an older one.' Such a break has been recognized only when a decision explicitly overrules a past precedent of this Court, or disapproves a practice this Court arguably has sanctioned in prior cases, or overturns a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved." *United States* v. *Johnson*, 457 U. S. 537, 551 (1982) (citations omitted).

After noting that the Government had argued that a ruling should not be retroactive if the law had been "unsettled" prior to the ruling, *id.*, at 559, the Court wrote:

> "[T]he Government's [position] would reduce its own 'retroactivity test' to an absurdity. Under this view, the only Fourth Amendment rulings worthy of retroactive application are those in which the arresting officers violated pre-existing guidelines clearly established by prior cases. But as we have seen above, cases involving simple application of clear, pre-existing Fourth Amendment guidelines raise no real problems of retroactivity at all. Literally read, the Government's theory would automatically eliminate *all* Fourth Amendment rulings from consideration for retroactive application." *Id.*, at 560.

Of course, a rule of nonretroactivity in all cases has never been the law, and with good reason. Such a rule would immunize police conduct from scrutiny whenever a question can be said to be debatable; thus the authorities would never have an incentive to comply with even the plainest implications of our cases. It is for this reason that *Johnson* wisely rejected such a rule.[11] Nor does the majority purport to endorse such a rule today. Yet that is the plain import of its holding, since nothing but law that already has been clearly established will ever be applied if, as the majority suggests, cases cannot qualify for "retroactive" application merely because they involve an "unsettled" question, even when this Court has already "strongly indicated," *ante*, at 647 (quoting *Edwards*, 451 U. S., at 484), what the correct answer to the "unsettled" question is.

As *Johnson* points out, the majority's test for "retroactivity" is in reality no test at all. If the law were "settled" prior to *Edwards*, then no real retroactivity question would arise.[12] Respect for the orderly development of the law should require more faithful adherence to a recent precedent such as *Johnson* than is evidenced today, especially inasmuch as *Johnson*'s expressed purpose was to lend order and predictability to the law of retroactivity. See 457 U. S., at 542–548.

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[11] "If, as the Government argues, all rulings resolving unsettled Fourth Amendment questions should be nonretroactive, then, in close cases, law enforcement officials would have little incentive to err on the side of constitutional behavior. Official awareness of the dubious constitutionality of a practice would be counterbalanced by official certainty that, so long as the Fourth Amendment law in the area remained unsettled, evidence obtained through the questionable practice would be excluded only in the one case definitively resolving the unsettled question. Failure to accord *any* retroactive effect to Fourth Amendment rulings would 'encourage police or other courts to disregard the plain purport of our decisions, and to adopt a let's-wait-until-it's-decided-approach.'" 457 U. S., at 561 (emphasis in original) (footnote omitted) (quoting *Desist* v. *United States*, 394 U. S. 244, 277 (1969) (Fortas, J., dissenting)).

[12] Of course, in my view this in fact is not a retroactivity case, for precisely this reason. See Part I, *supra*.

III

The Court is understandably concerned about the conduct of private lawbreakers. That concern should not, however, divert its attention from the overriding importance of requiring strict obedience to the law by those officials who are entrusted with its enforcement—and, indeed, with its interpretation. For decisions of this kind have a corrosive effect in a society dedicated to the rule of law. There is, after all, profound wisdom in Justice Brandeis' observation:

> "Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face." *Olmstead* v. *United States*, 277 U. S. 438, 485 (1928) (dissenting opinion).

I respectfully dissent.

LYNCH, MAYOR OF PAWTUCKET, ET AL. *v.* DONNELLY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 82-1256. Argued October 4, 1983—Decided March 5, 1984

The city of Pawtucket, R. I., annually erects a Christmas display in a park owned by a nonprofit organization and located in the heart of the city's shopping district. The display includes, in addition to such objects as a Santa Claus house, a Christmas tree, and a banner that reads "SEASONS GREETINGS," a crèche or Nativity scene, which has been part of this annual display for 40 years or more. Respondents brought an action in Federal District Court, challenging the inclusion of the crèche in the display on the ground that it violated the Establishment Clause of the First Amendment, as made applicable to the states by the Fourteenth Amendment. The District Court upheld the challenge and permanently enjoined the city from including the crèche in the display. The Court of Appeals affirmed.

Held: Notwithstanding the religious significance of the crèche, Pawtucket has not violated the Establishment Clause. Pp. 672-687.

(a) The concept of a "wall" of separation between church and state is a useful metaphor but is not an accurate description of the practical aspects of the relationship that in fact exists. The Constitution does not require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. Anything less would require the "callous indifference," *Zorach* v. *Clauson*, 343 U. S. 306, 314, that was never intended by the Establishment Clause. Pp. 672-673.

(b) This Court's interpretation of the Establishment Clause comports with the contemporaneous understanding of the Framers' intent. That neither the draftsmen of the Constitution, who were Members of the First Congress, nor the First Congress itself, saw any establishment problem in employing Chaplains to offer daily prayers in the Congress is a striking example of the accommodation of religious beliefs intended by the Framers. Pp. 673-674.

(c) Our history is pervaded by official acknowledgment of the role of religion in American life, and equally pervasive is evidence of accommodation of all faiths and all forms of religious expression and hostility toward none. Pp. 674-678.

(d) Rather than taking an absolutist approach in applying the Establishment Clause and mechanically invalidating all governmental conduct or statutes that confer benefits or give special recognition to religion in general or to one faith, this Court has scrutinized challenged conduct or legislation to determine whether, in reality, it establishes a religion or religious faith or tends to do so. In the line-drawing process called for in each case, it has often been found useful to inquire whether the challenged law or conduct has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement of government with religion. But this Court has been unwilling to be confined to any single test or criterion in this sensitive area. Pp. 678–679.

(e) Here, the focus of the inquiry must be on the crèche in the context of the Christmas season. Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause. Pp. 679–680.

(f) Based on the record in this case, the city has a secular purpose for including the crèche in its Christmas display and has not impermissibly advanced religion or created an excessive entanglement between religion and government. The display is sponsored by the city to celebrate the Holiday recognized by Congress and national tradition and to depict the origins of that Holiday; these are legitimate secular purposes. Whatever benefit to one faith or religion or to all religions inclusion of the crèche in the display effects, is indirect, remote, and incidental, and is no more an advancement or endorsement of religion than the congressional and executive recognition of the origins of Christmas, or the exhibition of religious paintings in governmentally supported museums. This Court is unable to discern a greater aid to religion from the inclusion of the crèche than from the substantial benefits previously held not violative of the Establishment Clause. As to administrative entanglement, there is no evidence of contact with church authorities concerning the content or design of the exhibition prior to or since the city's purchase of the crèche. No expenditures for maintenance of the crèche have been necessary, and, since the city owns the crèche, now valued at $200, the tangible material it contributes is *de minimis*. Political divisiveness alone cannot serve to invalidate otherwise permissible conduct, and, in any event, apart from the instant litigation, there is no evidence of political friction or divisiveness over the crèche in the 40-year history of the city's Christmas celebration. Pp. 680–685.

(g) It would be ironic if the inclusion of the crèche in the display, as part of a celebration of an event acknowledged in the Western World for 20 centuries, and in this country by the people, the Executive Branch, Congress, and the courts for 2 centuries, would so "taint" the exhibition as to render it violative of the Establishment Clause. To forbid the use of this one passive symbol while hymns and carols are sung and played in public places including schools, and while Congress and state legislatures open public sessions with prayers, would be an overreaction contrary to this Nation's history and this Court's holdings. Pp. 685–686.

691 F. 2d 1029, reversed.

BURGER, C. J., delivered the opinion of the Court, in which WHITE, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. O'CONNOR, J., filed a concurring opinion, *post*, p. 687. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, BLACKMUN, and STEVENS, JJ., joined, *post*, p. 694. BLACKMUN, J., filed a dissenting opinion, in which STEVENS, J., joined, *post*, p. 726.

William F. McMahon argued the cause for petitioners. With him on the briefs were *Richard P. McMahon* and *Spencer W. Viner*.

Solicitor General Lee argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Assistant Attorney General McGrath, Deputy Solicitor General Bator, Deputy Assistant Attorney General Kuhl*, and *Kathryn A. Oberly*.

Amato A. DeLuca argued the cause for respondents. With him on the brief were *Sandra A. Blanding, Burt Neuborne, E. Richard Larson*, and *Norman Dorsen*.*

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether the Establishment Clause of the First Amendment prohibits a municipality

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*Briefs of *amici curiae* urging reversal were filed for the Coalition for Religious Liberty et al. by *James J. Knicely* and *John W. Whitehead;* for the Legal Foundation of America by *David Crump;* and for the Washington Legal Foundation by *Daniel J. Popeo, Paul D. Kamenar*, and *Nicholas E. Calio.*

Briefs of *amici curiae* urging affirmance were filed for the American Jewish Committee et al. by *Samuel Rabinove;* and for the Anti-Defamation League of B'Nai B'rith et al. by *Justin J. Finger, Alan Dershowitz, Meyer Eisenberg, Jeffrey P. Sinensky, Nathan Z. Dershowitz*, and *Marc Stern.*

from including a crèche, or Nativity scene, in its annual Christmas display.

I

Each year, in cooperation with the downtown retail merchants' association, the city of Pawtucket, R. I., erects a Christmas display as part of its observance of the Christmas holiday season. The display is situated in a park owned by a nonprofit organization and located in the heart of the shopping district. The display is essentially like those to be found in hundreds of towns or cities across the Nation—often on public grounds—during the Christmas season. The Pawtucket display comprises many of the figures and decorations traditionally associated with Christmas, including, among other things, a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads "SEASONS GREETINGS," and the crèche at issue here. All components of this display are owned by the city.

The crèche, which has been included in the display for 40 or more years, consists of the traditional figures, including the Infant Jesus, Mary and Joseph, angels, shepherds, kings, and animals, all ranging in height from 5" to 5'. In 1973, when the present crèche was acquired, it cost the city $1,365; it now is valued at $200. The erection and dismantling of the crèche costs the city about $20 per year; nominal expenses are incurred in lighting the crèche. No money has been expended on its maintenance for the past 10 years.

Respondents, Pawtucket residents and individual members of the Rhode Island affiliate of the American Civil Liberties Union, and the affiliate itself, brought this action in the United States District Court for Rhode Island, challenging the city's inclusion of the crèche in the annual display. The District Court held that the city's inclusion of the crèche in the display violates the Establishment Clause, 525 F. Supp. 1150, 1178 (1981), which is binding on the states through the

Fourteenth Amendment. The District Court found that, by including the crèche in the Christmas display, the city has "tried to endorse and promulgate religious beliefs," *id.*, at 1173, and that "erection of the creche has the real and substantial effect of affiliating the City with the Christian beliefs that the creche represents." *Id.*, at 1177. This "appearance of official sponsorship," it believed, "confers more than a remote and incidental benefit on Christianity." *Id.*, at 1178. Last, although the court acknowledged the absence of administrative entanglement, it found that excessive entanglement has been fostered as a result of the political divisiveness of including the crèche in the celebration. *Id.*, at 1179–1180. The city was permanently enjoined from including the crèche in the display.

A divided panel of the Court of Appeals for the First Circuit affirmed. 691 F. 2d 1029 (1982). We granted certiorari, 460 U. S. 1080 (1983), and we reverse.

II

A

This Court has explained that the purpose of the Establishment and Free Exercise Clauses of the First Amendment is

> "to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other." *Lemon* v. *Kurtzman*, 403 U. S. 602, 614 (1971).

At the same time, however, the Court has recognized that

> "total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable." *Ibid.*

In every Establishment Clause case, we must reconcile the inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other, and the reality that, as the Court has so often noted, total separation of the two is not possible.

The Court has sometimes described the Religion Clauses as erecting a "wall" between church and state, see, *e. g., Everson* v. *Board of Education*, 330 U. S. 1, 18 (1947). The concept of a "wall" of separation is a useful figure of speech probably deriving from views of Thomas Jefferson.[1] The metaphor has served as a reminder that the Establishment Clause forbids an established church or anything approaching it. But the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state.

No significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government. "It has never been thought either possible or desirable to enforce a regime of total separation . . . ." *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U. S. 756, 760 (1973). Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. See, *e. g., Zorach* v. *Clauson*, 343 U. S. 306, 314, 315 (1952); *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 203, 211 (1948). Anything less would require the "callous indifference" we have said was never intended by the Establishment Clause. *Zorach, supra*, at 314. Indeed, we have observed, such hostility would bring us into "war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion." *McCollum, supra*, at 211–212.

B

The Court's interpretation of the Establishment Clause has comported with what history reveals was the contemporaneous understanding of its guarantees. A significant example of the contemporaneous understanding of that Clause is found in the events of the first week of the First Session of the First Congress in 1789. In the very week that Congress approved the Establishment Clause as part of the Bill of Rights for submission to the states, it enacted legislation providing for paid Chaplains for the House and Senate. In *Marsh* v. *Chambers*, 463 U. S. 783 (1983), we noted that 17 Members of that First Congress had been Delegates to the Constitutional Convention where freedom of speech, press, and religion and antagonism toward an established church were subjects of frequent discussion. We saw no conflict with the Establishment Clause when Nebraska employed members of the clergy as official legislative Chaplains to give opening prayers at sessions of the state legislature. *Id.*, at 791.

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[1] See *Reynolds* v. *United States*, 98 U. S. 145, 164 (1879) (quoting reply from Thomas Jefferson to an address by a committee of the Danbury Baptist Association (January 1, 1802)).

The interpretation of the Establishment Clause by Congress in 1789 takes on special significance in light of the Court's emphasis that the First Congress

> "was a Congress whose constitutional decisions have always been regarded, as they should be regarded, as of the greatest weight in the interpretation of that fundamental instument," *Myers* v. *United States*, 272 U. S. 52, 174–175 (1926).

It is clear that neither the 17 draftsmen of the Constitution who were Members of the First Congress, nor the Congress of 1789, saw any establishment problem in the employment of congressional Chaplains to offer daily prayers in the Congress, a practice that has continued for nearly two centuries. It would be difficult to identify a more striking example of the accommodation of religious belief intended by the Framers.

C

There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789. Seldom in our opinions was this more affirmatively expressed than in Justice Douglas' opinion for the Court validating a program allowing release of public school students from classes to attend off-campus religious exercises. Rejecting a claim that the program violated the Establishment Clause, the Court asserted pointedly:

> "We are a religious people whose institutions presuppose a Supreme Being." *Zorach* v. *Clauson*, *supra*, at 313.

See also *Abington School District* v. *Schempp*, 374 U. S. 203, 213 (1963).

Our history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders. Beginning in the early colonial period long before Independence, a day of Thanksgiving was celebrated as a religious holiday to give thanks for the bounties of Nature as gifts from God. President Washington and his successors proclaimed Thanksgiving, with all its religious overtones, a day of national celebration[2] and Congress made it a National Holiday more than a century ago. Ch. 167, 16 Stat. 168. That holiday has not lost its theme of expressing thanks for Divine aid[3] any more than has Christmas lost its religious significance.

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[2] The day after the First Amendment was proposed, Congress urged President Washington to proclaim "a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favours of Almighty God." See A. Stokes & L. Pfeffer, Church and State in the United States 87 (rev. 1st ed. 1964). President Washington proclaimed November 26, 1789, a day of thanksgiving to "offe[r] our prayers and supplications to the Great Lord and Ruler of Nations, and beseech Him to pardon our national and other transgressions . . . ." 1 J. Richardson, A Compilation of the Messages and Papers of the Presidents 1789–1897, p. 64 (1899).

Presidents Adams and Madison also issued Thanksgiving Proclamations, as have almost all our Presidents, see 3 A. Stokes, Church and State in the United States 180–193 (1950), through the incumbent, see Presidential Proclamation No. 4883, 3 CFR 68 (1982).

[3] An example is found in President Roosevelt's 1944 Proclamation of Thanksgiving:

"[I]t is fitting that we give thanks with special fervor to our Heavenly Father for the mercies we have received individually and as a nation and

Executive Orders and other official announcements of Presidents and of the Congress have proclaimed both Christmas and Thanksgiving National Holidays in religious terms. And, by Acts of Congress, it has long been the practice that federal employees are released from duties on these National Holidays, while being paid from the same public revenues that provide the compensation of the Chaplains of the Senate and the House and the military services. See J. Res. 5, 23 Stat. 516. Thus, it is clear that Government has long recognized—indeed it has subsidized—holidays with religious significance.

Other examples of reference to our religious heritage are found in the statutorily prescribed national motto "In God We Trust," 36 U. S. C. § 186, which Congress and the President mandated for our currency, see 31 U. S. C. § 5112(d)(1) (1982 ed.), and in the language "One nation under God," as part of the Pledge of Allegiance to the American flag. That pledge is recited by many thousands of public school children—and adults—every year.

Art galleries supported by public revenues display religious paintings of the 15th and 16th centuries, predominantly inspired by one religious faith. The National Gallery in

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for the blessings He has restored, through the victories of our arms and those of our Allies, to His children in other lands.

. . . . .

"To the end that we may bear more earnest witness to our gratitude to Almighty God, I suggest a nationwide reading of the Holy Scriptures during the period from Thanksgiving Day to Christmas." Presidential Proclamation No. 2629, 58 Stat. 1160.

President Reagan and his immediate predecessors have issued similar Proclamations. See, *e. g.*, Presidential Proclamation No. 5098, 3 CFR 94 (1984); Presidential Proclamation No. 4803, 3 CFR 117 (1981); Presidential Proclamation No. 4333, 3 CFR 419 (1971–1975 Comp.); Presidential Proclamation No. 4093, 3 CFR 89 (1971–1975 Comp.); Presidential Proclamation No. 3752, 3 CFR 75 (1966–1970 Comp.); Presidential Proclamation No. 3560, 3 CFR 312 (1959–1963 Comp.).

Washington, maintained with Government support, for example, has long exhibited masterpieces with religious messages, notably the Last Supper, and paintings depicting the Birth of Christ, the Crucifixion, and the Resurrection, among many others with explicit Christian themes and messages.[4] The very chamber in which oral arguments on this case were heard is decorated with a notable and permanent—not seasonal—symbol of religion: Moses with the Ten Commandments. Congress has long provided chapels in the Capitol for religious worship and meditation.

There are countless other illustrations of the Government's acknowledgment of our religious heritage and governmental sponsorship of graphic manifestations of that heritage. Congress has directed the President to proclaim a National Day of Prayer each year "on which [day] the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals." 36 U. S. C. § 169h. Our Presidents have repeatedly issued such Proclamations.[5] Presidential Proclamations and messages have also issued to commemorate Jewish Heritage Week, Presidential Proclamation No. 4844, 3 CFR 30 (1982), and the Jewish High Holy Days, 17 Weekly Comp. of Pres. Doc. 1058 (1981). One cannot look at even this brief résumé without finding that our history is pervaded by expressions of religious beliefs such as are found in *Zorach*. Equally pervasive is the evidence of accommodation of all faiths and all forms of religious expression, and hostility toward none. Through this accommodation, as Justice Douglas observed, governmental action has "follow[ed] the best of our traditions" and "respect[ed] the religious nature of our people." 343 U. S., at 314.

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[4] The National Gallery regularly exhibits more than 200 similar religious paintings.

[5] See, *e. g.*, Presidential Proclamation No. 5017, 3 CFR 8 (1984); Presidential Proclamation No. 4795, 3 CFR 109 (1981); Presidential Proclamation No. 4379, 3 CFR 486 (1971–1975 Comp.); Presidential Proclamation No. 4087, 3 CFR 81 (1971–1975 Comp.); Presidential Proclamation No. 3812, 3 CFR 155 (1966–1970 Comp.); Presidential Proclamation No. 3501, 3 CFR 228 (1959–1963 Comp.).

III

This history may help explain why the Court consistently has declined to take a rigid, absolutist view of the Establishment Clause. We have refused "to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective *as illuminated by history.*" *Walz* v. *Tax Comm'n,* 397 U. S. 664, 671 (1970) (emphasis added). In our modern, complex society, whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas, an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court.

Rather than mechanically invalidating all governmental conduct or statutes that confer benefits or give special recognition to religion in general or to one faith—as an absolutist approach would dictate—the Court has scrutinized challenged legislation or official conduct to determine whether, in reality, it establishes a religion or religious faith, or tends to do so. See *Walz, supra,* at 669. Joseph Story wrote a century and a half ago:

> "The real object of the [First] Amendment was . . . to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government." 3 J. Story, Commentaries on the Constitution of the United States 728 (1833).

In each case, the inquiry calls for line-drawing; no fixed, *per se* rule can be framed. The Establishment Clause like the Due Process Clauses is not a precise, detailed provision in a legal code capable of ready application. The purpose of the Establishment Clause "was to state an objective, not to write a statute." *Walz, supra,* at 668. The line between permissible relationships and those barred by the Clause can no more be straight and unwavering than due process can be defined in a single stroke or phrase or test. The Clause erects a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Lemon*, 403 U. S., at 614.

In the line-drawing process we have often found it useful to inquire whether the challenged law or conduct has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement of government with religion. *Lemon, supra*. But, we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area. See, *e. g., Tilton* v. *Richardson*, 403 U. S. 672, 677–678 (1971); *Nyquist*, 413 U. S., at 773. In two cases, the Court did not even apply the *Lemon* "test." We did not, for example, consider that analysis relevant in *Marsh* v. *Chambers*, 463 U. S. 783 (1983). Nor did we find *Lemon* useful in *Larson* v. *Valente*, 456 U. S. 228 (1982), where there was substantial evidence of overt discrimination against a particular church.

In this case, the focus of our inquiry must be on the crèche in the context of the Christmas season. See, *e. g., Stone* v. *Graham*, 449 U. S. 39 (1980) *(per curiam); Abington School District* v. *Schempp*, 374 U. S. 203 (1963). In *Stone*, for example, we invalidated a state statute requiring the posting of a copy of the Ten Commandments on public classroom walls. But the Court carefully pointed out that the Commandments were posted purely as a religious admonition, not "integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like." 449 U. S., at 42. Similarly, in *Abington*, although the Court struck down the practices in two States requiring daily Bible readings in public schools, it specifically noted that nothing in the Court's holding was intended to "indicat[e] that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment." 374 U. S., at 225. Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause.

The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations. See, *e. g.*, *Stone* v. *Graham*, *supra*, at 41; *Epperson* v. *Arkansas*, 393 U. S. 97, 107–109 (1968); *Abington School District* v. *Schempp*, *supra*, at 223–224; *Engel* v. *Vitale*, 370 U. S. 421, 424–425 (1962). Even where the benefits to religion were substantial, as in *Everson* v. *Board of Education*, 330 U. S. 1 (1947); *Board of Education* v. *Allen*, 392 U. S. 236 (1968); *Walz*, *supra;* and *Tilton*, *supra*, we saw a secular purpose and no conflict with the Establishment Clause. Cf. *Larkin* v. *Grendel's Den, Inc.*, 459 U. S. 116 (1982).

The District Court inferred from the religious nature of the crèche that the city has no secular purpose for the display. In so doing, it rejected the city's claim that its reasons for including the crèche are essentially the same as its reasons for sponsoring the display as a whole. The District Court plainly erred by focusing almost exclusively on the crèche. When viewed in the proper context of the Christmas Holiday season, it is apparent that, on this record, there is insufficient evidence to establish that the inclusion of the crèche is a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message. In a pluralistic society a variety of motives and purposes are implicated. The city, like the Congresses and Presidents, however, has principally taken note of a significant historical religious event long celebrated in the Western World. The crèche in the display depicts the historical origins of this traditional event long recognized as a National Holiday. See *Allen* v. *Hickel*, 138 U. S. App. D. C. 31, 424 F. 2d 944

(1970); *Citizens Concerned for Separation of Church and State* v. *City and County of Denver*, 526 F. Supp. 1310 (Colo. 1981).

The narrow question is whether there is a secular purpose for Pawtucket's display of the crèche. The display is sponsored by the city to celebrate the Holiday and to depict the origins of that Holiday. These are legitimate secular purposes.[6] The District Court's inference, drawn from the religious nature of the crèche, that the city has no secular purpose was, on this record, clearly erroneous.[7]

The District Court found that the primary effect of including the crèche is to confer a substantial and impermissible benefit on religion in general and on the Christian faith in particular. Comparisons of the relative benefits to religion of different forms of governmental support are elusive and difficult to make. But to conclude that the primary effect of including the crèche is to advance religion in violation of the Establishment Clause would require that we view it as more beneficial to and more an endorsement of religion, for example, than expenditure of large sums of public money for textbooks supplied throughout the country to students attending church-sponsored schools, *Board of Education* v. *Allen*, *supra;*[8] expenditure of public funds for transportation of students to church-sponsored schools, *Everson* v. *Board of Education, supra;*[9] federal grants for college buildings of church-sponsored institutions of higher education combining secular and religious education, *Tilton* v. *Richardson,* 403 U. S. 672 (1971);[10] noncategorical grants to church-sponsored colleges and universities, *Roemer* v. *Board of Public Works,* 426 U. S. 736 (1976); and the tax exemptions for church properties sanctioned in *Walz* v. *Tax Comm'n,* 397 U. S. 664 (1970). It would also require that we view it as more of an endorsement of religion than the Sunday Closing Laws upheld in *McGowan* v. *Maryland,* 366 U. S. 420 (1961);[11] the release time program for religious training in *Zorach* v. *Clauson,* 343 U. S. 306 (1952); and the legislative prayers upheld in *Marsh* v. *Chambers,* 463 U. S. 783 (1983).

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[6] The city contends that the purposes of the display are "exclusively secular." We hold only that Pawtucket has a secular purpose for its display, which is all that *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971), requires. Were the test that the government must have "exclusively secular" objectives, much of the conduct and legislation this Court has approved in the past would have been invalidated.

[7] JUSTICE BRENNAN argues that the city's objectives could have been achieved without including the crèche in the display, *post*, at 699. True or not, that is irrelevant. The question is whether the display of the crèche violates the Establishment Clause.

[8] The *Allen* Court noted that "[p]erhaps free books make it more likely that some children choose to attend a sectarian school . . . ." 392 U. S., at 244.

We are unable to discern a greater aid to religion deriving from inclusion of the crèche than from these benefits and endorsements previously held not violative of the Establishment Clause. What was said about the legislative prayers in *Marsh, supra,* at 792, and implied about the Sunday Closing Laws in *McGowan* is true of the city's inclusion of the crèche: its "reason or effect merely happens to coincide or harmonize with the tenets of some . . . religions." See *McGowan, supra,* at 442.

This case differs significantly from *Larkin* v. *Grendel's Den, Inc., supra,* and *McCollum,* where religion was substantially aided. In *Grendel's Den,* important governmental power—a licensing veto authority—had been vested in churches. In *McCollum,* government had made religious instruction available in public school classrooms; the State had not only used the public school buildings for the teaching of religion, it had "afford[ed] sectarian groups an invaluable aid . . . [by] provid[ing] pupils for their religious classes through use of the State's compulsory public school machinery." 333 U. S., at 212. No comparable benefit to religion is discernible here.

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[9] In *Everson,* the Court acknowledged that "[i]t is undoubtedly true that children are helped to get to church schools," and that "some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets . . . ." 330 U. S., at 17.

[10] We recognized in *Tilton* that the construction grants "surely aid[ed]" the institutions that received them. 403 U. S., at 679.

[11] "In *McGowan* v. *Maryland* . . . Sunday Closing Laws were sustained even though one of their undeniable effects was to render it somewhat more likely that citizens would respect religious institutions and even attend religious services." *Committee for Public Education & Religious Liberty* v. *Nyquist,* 413 U. S. 756, 775–776 (1973).

The dissent asserts some observers may perceive that the city has aligned itself with the Christian faith by including a Christian symbol in its display and that this serves to advance religion. We can assume, *arguendo,* that the display advances religion in a sense; but our precedents plainly contemplate that on occasion some advancement of religion will result from governmental action. The Court has made it abundantly clear, however, that "not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon [religion] is, for that reason alone, constitutionally invalid." *Nyquist,* 413 U. S., at 771; see also *Widmar* v. *Vincent,* 454 U. S. 263, 273 (1981). Here, whatever benefit there is to one faith or religion or to all religions, is indirect, remote, and incidental; display of the crèche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as "Christ's Mass," or the exhibition of literally hundreds of religious paintings in governmentally supported museums.

The District Court found that there had been no administrative entanglement between religion and state resulting from the city's ownership and use of the crèche. 525 F. Supp., at 1179. But it went on to hold that some political divisiveness was engendered by this litigation. Coupled with its finding of an impermissible sectarian purpose and effect, this persuaded the court that there was "excessive entanglement." The Court of Appeals expressly declined to accept the District Court's finding that inclusion of the crèche has caused political divisiveness along religious lines, and noted that this Court has never held that political divisiveness alone was sufficient to invalidate government conduct.

Entanglement is a question of kind and degree. In this case, however, there is no reason to disturb the District Court's finding on the absence of administrative entanglement. There is no evidence of contact with church authorities concerning the content or design of the exhibit prior to or since Pawtucket's purchase of the crèche. No expenditures for maintenance of the crèche have been necessary; and since the city owns the crèche, now valued at $200, the tangible material it contributes is *de minimis*. In many respects the display requires far less ongoing, day-to-day interaction between church and state than religious paintings in public galleries. There is nothing here, of course, like the "comprehensive, discriminating, and continuing state surveillance" or the "enduring entanglement" present in *Lemon*, 403 U. S., at 619–622.

The Court of Appeals correctly observed that this Court has not held that political divisiveness alone can serve to invalidate otherwise permissible conduct. And we decline to so hold today. This case does not involve a direct subsidy to church-sponsored schools or colleges, or other religious institutions, and hence no inquiry into potential political divisiveness is even called for, *Mueller* v. *Allen*, 463 U. S. 388, 403–404, n. 11 (1983). In any event, apart from this litigation there is no evidence of political friction or divisiveness over the crèche in the 40-year history of Pawtucket's Christmas celebration. The District Court stated that the inclusion of the crèche for the 40 years has been "marked by no apparent dissension" and that the display has had a "calm history." 525 F. Supp., at 1179. Curiously, it went on to hold that the political divisiveness engendered by this lawsuit was evidence of excessive entanglement. A litigant cannot, by the very act of commencing a lawsuit, however, create the appearance of divisiveness and then exploit it as evidence of entanglement.

We are satisfied that the city has a secular purpose for including the crèche, that the city has not impermissibly advanced religion, and that including the crèche does not create excessive entanglement between religion and government.

IV

JUSTICE BRENNAN describes the crèche as a "re-creation of an event that lies at the heart of Christian faith," *post*, at 711. The crèche, like a painting, is passive; admittedly it is a reminder of the origins of Christmas. Even the traditional, purely secular displays extant at Christmas, with or without a crèche, would inevitably recall the religious nature of the Holiday. The display engenders a friendly community spirit of goodwill in keeping with the season. The crèche may well have special meaning to those whose faith includes the celebration of religious Masses, but none who sense the origins of the Christmas celebration would fail to be aware of its religious implications. That the display brings people into the central city, and serves commercial interests and benefits merchants and their employees, does not, as the dissent points out, determine the character of the display. That a prayer invoking Divine guidance in Congress is preceded and followed by debate and partisan conflict over taxes, budgets, national defense, and myriad mundane subjects, for example, has never been thought to demean or taint the sacredness of the invocation.[12]

Of course the crèche is identified with one religious faith but no more so than the examples we have set out from prior cases in which we found no conflict with the Establishment

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[12] JUSTICE BRENNAN states that "by focusing on the holiday 'context' in which the nativity scene appear[s]," the Court "seeks to explain away the clear religious import of the crèche," *post*, at 705, and that it has equated the crèche with a Santa's house or reindeer, *post*, at 711–712. Of course this is not true.

Clause. See, *e. g., McGowan* v. *Maryland,* 366 U. S. 420 (1961); *Marsh* v. *Chambers,* 463 U. S. 783 (1983). It would be ironic, however, if the inclusion of a single symbol of a particular historic religious event, as part of a celebration acknowledged in the Western World for 20 centuries, and in this country by the people, by the Executive Branch, by the Congress, and the courts for 2 centuries, would so "taint" the city's exhibit as to render it violative of the Establishment Clause. To forbid the use of this one passive symbol—the crèche—at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places, and while the Congress and legislatures open sessions with prayers by paid chaplains, would be a stilted overreaction contrary to our history and to our holdings. If the presence of the crèche in this display violates the Establishment Clause, a host of other forms of taking official note of Christmas, and of our religious heritage, are equally offensive to the Constitution.

The Court has acknowledged that the "fears and political problems" that gave rise to the Religion Clauses in the 18th century are of far less concern today. *Everson,* 330 U. S., at 8. We are unable to perceive the Archbishop of Canterbury, the Bishop of Rome, or other powerful religious leaders behind every public acknowledgment of the religious heritage long officially recognized by the three constitutional branches of government. Any notion that these symbols pose a real danger of establishment of a state church is farfetched indeed.

V

That this Court has been alert to the constitutionally expressed opposition to the establishment of religion is shown in numerous holdings striking down statutes or programs as violative of the Establishment Clause. See, *e. g., Illinois ex rel. McCollum* v. *Board of Education,* 333 U. S. 203 (1948); *Epperson* v. *Arkansas,* 393 U. S. 97 (1968); *Lemon* v. *Kurtzman, supra; Levitt* v. *Committee for Public Education & Religious Liberty,* 413 U. S. 472 (1973); *Committee* *for Public Education & Religious Liberty* v. *Nyquist,* 413 U. S. 756 (1973); *Meek* v. *Pittenger,* 421 U. S. 349 (1975); and *Stone* v. *Graham,* 449 U. S. 39 (1980). The most recent example of this careful scrutiny is found in the case invalidating a municipal ordinance granting to a church a virtual veto power over the licensing of liquor establishments near the church. *Larkin* v. *Grendel's Den, Inc.,* 459 U. S. 116 (1982). Taken together these cases abundantly demonstrate the Court's concern to protect the genuine objectives of the Establishment Clause. It is far too late in the day to impose a crabbed reading of the Clause on the country.

VI

We hold that, notwithstanding the religious significance of the crèche, the city of Pawtucket has not violated the Establishment Clause of the First Amendment.[13] Accordingly, the judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE O'CONNOR, concurring.

I concur in the opinion of the Court. I write separately to suggest a clarification of our Establishment Clause doctrine. The suggested approach leads to the same result in this case as that taken by the Court, and the Court's opinion, as I read it, is consistent with my analysis.

I

The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. Government can run afoul of that prohibition in two principal ways. One is excessive entanglement with religious institutions, which may interfere with the independence of the institutions, give the institutions access to government or governmental powers not fully shared by nonadherents of the religion, and foster the creation of political constituencies defined along religious lines. *E. g.*, *Larkin* v. *Grendel's Den, Inc.*, 459 U. S. 116 (1982). The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message. See generally *Abington School District* v. *Schempp*, 374 U. S. 203 (1963).

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[13] The Court of Appeals viewed *Larson* v. *Valente,* 456 U. S. 228 (1982), as commanding a "strict scrutiny" due to the city's ownership of the $200 crèche which it considers as a discrimination between Christian and other religions. It is correct that we require strict scrutiny of a statute or practice patently discriminatory on its face. But we are unable to see this display, or any part of it, as explicitly discriminatory in the sense contemplated in *Larson.*

Our prior cases have used the three-part test articulated in *Lemon* v. *Kurtzman*, 403 U. S. 602, 612–613 (1971), as a guide to detecting these two forms of unconstitutional government action.* It has never been entirely clear, however,

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*The Court wrote in *Lemon* v. *Kurtzman* that a statute must pass three tests to withstand Establishment Clause challenge.

"First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" 403 U. S., at 612–613 (citations omitted).

Though phrased as a uniformly applicable test for constitutionality, this three-part test "provides 'no more than [a] helpful signpos[t]' in dealing with Establishment Clause challenges." *Mueller* v. *Allen*, 463 U. S. 388, 394 (1983) (quoting *Hunt* v. *McNair*, 413 U. S. 734, 741 (1973)).

Moreover, the Court has held that a statute or practice that plainly embodies an intentional discrimination among religions must be closely fitted to a compelling state purpose in order to survive constitutional challenge. See *Larson* v. *Valente*, 456 U. S. 228 (1982). As the Court's opinion observes, *ante*, at 687, n. 13, this case does not involve such discrimination. The *Larson* standard, I believe, may be assimilated to the *Lemon* test in the clarified version I propose. Plain intentional discrimination should give rise to a presumption, which may be overcome by a showing of compelling purpose and close fit, that the challenged government conduct constitutes an endorsement of the favored religion or a disapproval of the disfavored.

how the three parts of the test relate to the principles enshrined in the Establishment Clause. Focusing on institutional entanglement and on endorsement or disapproval of religion clarifies the *Lemon* test as an analytical device.

II

In this case, as even the District Court found, there is no institutional entanglement. Nevertheless, the respondents contend that the political divisiveness caused by Pawtucket's display of its crèche violates the excessive-entanglement prong of the *Lemon* test. The Court's opinion follows the suggestion in *Mueller* v. *Allen*, 463 U. S. 388, 403–404, n. 11 (1983), and concludes that "no inquiry into potential political divisiveness is even called for" in this case. *Ante*, at 684. In my view, political divisiveness along religious lines should not be an independent test of constitutionality.

Although several of our cases have discussed political divisiveness under the entanglement prong of *Lemon*, see, *e. g.*, *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U. S. 756, 796 (1973); *Lemon* v. *Kurtzman*, *supra*, at 623, we have never relied on divisiveness as an independent ground for holding a government practice unconstitutional. Guessing the potential for political divisiveness inherent in a government practice is simply too speculative an enterprise, in part because the existence of the litigation, as this case illustrates, itself may affect the political response to the government practice. Political divisiveness is admittedly an evil addressed by the Establishment Clause. Its existence may be evidence that institutional entanglement is excessive or that a government practice is perceived as an endorsement of religion. But the constitutional inquiry should focus ultimately on the character of the government activity that might cause such divisiveness, not on the divisiveness itself. The entanglement prong of the *Lemon* test is properly limited to institutional entanglement.

III

The central issue in this case is whether Pawtucket has endorsed Christianity by its display of the crèche. To answer that question, we must examine both what Pawtucket intended to communicate in displaying the crèche and what message the city's display actually conveyed. The purpose and effect prongs of the *Lemon* test represent these two aspects of the meaning of the city's action.

The meaning of a statement to its audience depends both on the intention of the speaker and on the "objective" meaning of the statement in the community. Some listeners need not rely solely on the words themselves in discerning the speaker's intent: they can judge the intent by, for example, examining the context of the statement or asking questions of the speaker. Other listeners do not have or will not seek access to such evidence of intent. They will rely instead on the words themselves; for them the message actually conveyed may be something not actually intended. If the audience is large, as it always is when government "speaks" by word or deed, some portion of the audience will inevitably receive a message determined by the "objective" content of the statement, and some portion will inevitably receive the intended message. Examination of both the subjective and the objective components of the message communicated by a government action is therefore necessary to determine whether the action carries a forbidden meaning.

The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.

A

The purpose prong of the *Lemon* test requires that a government activity have a secular purpose. That requirement is not satisfied, however, by the mere existence of some secular purpose, however dominated by religious purposes. In *Stone* v. *Graham*, 449 U. S. 39 (1980), for example, the Court held that posting copies of the Ten Commandments in schools violated the purpose prong of the *Lemon* test, yet the State plainly had some secular objectives, such as instilling most of the values of the Ten Commandments and illustrating their connection to our legal system, but see 449 U. S., at 41. See also *Abington School District* v. *Schempp*, 374 U. S., at 223–224. The proper inquiry under the purpose prong of *Lemon*, I submit, is whether the government intends to convey a message of endorsement or disapproval of religion.

Applying that formulation to this case, I would find that Pawtucket did not intend to convey any message of endorsement of Christianity or disapproval of non-Christian religions. The evident purpose of including the crèche in the larger display was not promotion of the religious content of the crèche but celebration of the public holiday through its traditional symbols. Celebration of public holidays, which have cultural significance even if they also have religious aspects, is a legitimate secular purpose.

The District Court's finding that the display of the crèche had no secular purpose was based on erroneous reasoning. The District Court believed that it should ascertain the city's purpose in displaying the crèche separate and apart from the general purpose in setting up the display. It also found that, because the tradition-celebrating purpose was suspect in the court's eyes, the city's use of an unarguably religious symbol "raises an inference" of intent to endorse. When viewed in light of correct legal principles, the District Court's finding of unlawful purpose was clearly erroneous.

B

Focusing on the evil of government endorsement or disapproval of religion makes clear that the effect prong of the *Lemon* test is properly interpreted not to require invalidation of a government practice merely because it in fact causes, even as a primary effect, advancement or inhibition of religion. The laws upheld in *Walz* v. *Tax Comm'n*, 397 U. S. 664 (1970) (tax exemption for religious, educational, and charitable organizations), in *McGowan* v. *Maryland*, 366 U. S. 420 (1961) (mandatory Sunday closing law), and in *Zorach* v. *Clauson*, 343 U. S. 306 (1952) (released time from school for off-campus religious instruction), had such effects, but they did not violate the Establishment Clause. What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community.

Pawtucket's display of its crèche, I believe, does not communicate a message that the government intends to endorse the Christian beliefs represented by the crèche. Although the religious and indeed sectarian significance of the crèche, as the District Court found, is not neutralized by the setting, the overall holiday setting changes what viewers may fairly understand to be the purpose of the display—as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content. The display celebrates a public holiday, and no one contends that declaration of that holiday is understood to be an endorsement of religion. The holiday itself has very strong secular components and traditions. Government celebration of the holiday, which is extremely common, generally is not understood to endorse the religious content of the holiday, just as government celebration of Thanksgiving is not so understood. The crèche is a traditional symbol of the holiday that is very commonly displayed along with purely secular symbols, as it was in Pawtucket.

These features combine to make the government's display of the crèche in this particular physical setting no more an endorsement of religion than such governmental "acknowledgments" of religion as legislative prayers of the type approved in *Marsh* v. *Chambers*, 463 U. S. 783 (1983), government declaration of Thanksgiving as a public holiday, printing of "In God We Trust" on coins, and opening court sessions with "God save the United States and this honorable court." Those government acknowledgments of religion serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs. The display of the crèche likewise serves a secular purpose—celebration of a public holiday with traditional symbols. It cannot fairly be understood to convey a message of government endorsement of religion. It is significant in this regard that the crèche display apparently caused no political divisiveness prior to the filing of this lawsuit, although Pawtucket had incorporated the crèche in its annual Christmas display for some years. For these reasons, I conclude that Pawtucket's display of the crèche does not have the effect of communicating endorsement of Christianity.

The District Court's subsidiary findings on the effect test are consistent with this conclusion. The court found as facts that the crèche has a religious content, that it would not be seen as an insignificant part of the display, that its religious content is not neutralized by the setting, that the display is celebratory and not instructional, and that the city did not seek to counteract any possible religious message. These findings do not imply that the crèche communicates government approval of Christianity. The District Court also found, however, that the government was understood to place its imprimatur on the religious content of the crèche. But whether a government activity communicates endorsement of religion is not a question of simple historical fact.

Although evidentiary submissions may help answer it, the question is, like the question whether racial or sex-based classifications communicate an invidious message, in large part a legal question to be answered on the basis of judicial interpretation of social facts. The District Court's conclusion concerning the effect of Pawtucket's display of its crèche was in error as a matter of law.

IV

Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion. In making that determination, courts must keep in mind both the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded. Government practices that purport to celebrate or acknowledge events with religious significance must be subjected to careful judicial scrutiny.

The city of Pawtucket is alleged to have violated the Establishment Clause by endorsing the Christian beliefs represented by the crèche included in its Christmas display. Giving the challenged practice the careful scrutiny it deserves, I cannot say that the particular crèche display at issue in this case was intended to endorse or had the effect of endorsing Christianity. I agree with the Court that the judgment below must be reversed.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting.

The principles announced in the compact phrases of the Religion Clauses have, as the Court today reminds us, *ante*, at 678–679, proved difficult to apply. Faced with that uncertainty, the Court properly looks for guidance to the settled test announced in *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971), for assessing whether a challenged governmental practice involves an impermissible step toward the establishment of religion. *Ante*, at 679. Applying that test to this case, the

Court reaches an essentially narrow result which turns largely upon the particular holiday context in which the city of Pawtucket's nativity scene appeared. The Court's decision implicitly leaves open questions concerning the constitutionality of the public display on public property of a crèche standing alone, or the public display of other distinctively religious symbols such as a cross.[1] Despite the narrow contours of the Court's opinion, our precedents in my view compel the holding that Pawtucket's inclusion of a life-sized display depicting the biblical description of the birth of Christ as part of its annual Christmas celebration is unconstitutional. Nothing in the history of such practices or the setting in which the city's crèche is presented obscures or diminishes the plain fact that Pawtucket's action amounts to an impermissible governmental endorsement of a particular faith.

I

Last Term, I expressed the hope that the Court's decision in *Marsh* v. *Chambers*, 463 U. S. 783 (1983), would prove to be only a single, aberrant departure from our settled method of analyzing Establishment Clause cases. *Id.*, at 796 (BRENNAN, J., dissenting). That the Court today returns to the settled analysis of our prior cases gratifies that hope. At the same time, the Court's less-than-vigorous application of the *Lemon* test suggests that its commitment to those standards may only be superficial.[2] After reviewing the Court's opinion, I am convinced that this case appears hard not because the principles of decision are obscure, but because the Christmas holiday seems so familiar and agreeable. Although the

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[1] For instance, nothing in the Court's opinion suggests that the Court of Appeals for the Third Circuit erred when it found that a city-financed platform and cross used by Pope John Paul II to celebrate Mass and deliver a sermon during his 1979 visit to Philadelphia was an unconstitutional expenditure of city funds. *Gilfillan* v. *City of Philadelphia*, 637 F. 2d 924 (1980). Nor does the Court provide any basis for disputing the holding of the Court of Appeals for the Eleventh Circuit that the erection and maintenance of an illuminated Latin cross on state park property violates the Establishment Clause. *American Civil Liberties Union of Georgia* v. *Rabun County Chamber of Commerce, Inc.*, 698 F. 2d 1098 (1983). See also *Fox* v. *City of Los Angeles*, 22 Cal. 3d 792, 587 P. 2d 663 (1978); *Lowe* v. *City of Eugene*, 254 Ore. 539, 463 P. 2d 360 (1969). And given the Court's focus upon the otherwise secular setting of the Pawtucket crèche, it remains uncertain whether absent such secular symbols as Santa Claus' house, a talking wishing well, and cutout clowns and bears, a similar nativity scene would pass muster under the Court's standard. Cf. *McCreary* v. *Stone*, 575 F. Supp. 1112 (SDNY 1983) (holding that village did not violate Establishment Clause by refusing to permit a private group to erect a crèche in a public park).

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[2] Although I agree with the Court that no single formula can ever fully capture the analysis that may be necessary to resolve difficult Establishment Clause problems, see n. 11, *infra*, I fail to understand the Court's insistence upon referring to the settled test set forth in *Lemon* as simply one path that may be followed or not at the Court's option. See *ante*, at 679. The Court's citation of *Tilton* v. *Richardson*, 403 U. S. 672 (1971), and *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U. S. 756 (1973), to support this assertion is meaningless because both of those decisions applied the three-prong *Lemon* test. Indeed, ever since its initial formulation, the *Lemon* test has been consistently looked upon as the fundamental tool of Establishment Clause analysis. In *Nyquist*, the Court described the test in mandatory terms: "Taken together, [our] decisions dictate that to pass muster under the Establishment Clause the law in question [must satisfy the three elements of the *Lemon* test]." 413 U. S., at 772–773. And just last Term in *Larkin* v. *Grendel's Den, Inc.*, 459 U. S. 116 (1982), THE CHIEF JUSTICE, speaking for the Court, wrote that "[t]his Court has consistently held that a statute must satisfy three criteria [as set forth in *Lemon*] to pass muster under the Establishment Clause." *Id.*, at 123. See also *Stone* v. *Graham*, 449 U. S. 39, 40–41 (1980) *(per curiam)*; *Wolman* v. *Walter*, 433 U. S. 229, 235–236 (1977). In addition, the Court's citation of *Larson* v. *Valente*, 456 U. S. 228 (1982), also fails to support the Court's assertion. In *Larson*, we first reviewed a state law granting a denominational preference under a "strict scrutiny" analysis, *id.*, at 246–251, but then concluded by finding the statute unconstitutional under the *Lemon* analysis as well. *Id.*, at 251–255. Thus, despite the Court's efforts to evade the point, the fact remains that *Marsh* v. *Chambers*, 463 U. S. 783 (1983), is the only case in which the Court has not applied either the *Lemon* or a "strict scrutiny" analysis. I can only conclude that with today's unsupported assertion, the Court hopes to provide a belated excuse for the failure in *Marsh* to address the analysis of the *Lemon* test.

Court's reluctance to disturb a community's chosen method of celebrating such an agreeable holiday is understandable, that cannot justify the Court's departure from controlling precedent. In my view, Pawtucket's maintenance and display at public expense of a symbol as distinctively sectarian as a crèche simply cannot be squared with our prior cases. And it is plainly contrary to the purposes and values of the Establishment Clause to pretend, as the Court does, that the otherwise secular setting of Pawtucket's nativity scene dilutes in some fashion the crèche's singular religiosity, or that the city's annual display reflects nothing more than an "acknowledgment" of our shared national heritage. Neither the character of the Christmas holiday itself, nor our heritage of religious expression supports this result. Indeed, our remarkable and precious religious diversity as a Nation, see *Torcaso* v. *Watkins*, 367 U. S. 488, 495 (1961); *Abington School Dist.* v. *Schempp*, 374 U. S. 203, 240–241 (1963) (BRENNAN, J., concurring), which the Establishment Clause seeks to protect, runs directly counter to today's decision.

A

As we have sought to meet new problems arising under the Establishment Clause, our decisions, with few exceptions, have demanded that a challenged governmental practice satisfy the following criteria:

> "First, the [practice] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, [it] must not foster 'an excessive government entanglement with religion.'" *Lemon* v. *Kurtzman*, 403 U. S., at 612–613 (citations omitted).[3]

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[3] See *Larkin* v. *Grendel's Den, Inc.*, *supra*, at 123; *Widmar* v. *Vincent*, 454 U. S. 263, 271 (1981); *Wolman* v. *Walter*, 433 U. S. 229, 236 (1977); *Walz* v. *Tax Comm'n*, 397 U. S. 664, 674 (1970). As JUSTICE O'CONNOR's concurring opinion rightly observes, this test provides a helpful analytical

This well-defined three-part test expresses the essential concerns animating the Establishment Clause. Thus, the test is designed to ensure that the organs of government remain strictly separate and apart from religious affairs, for "a union of government and religion tends to destroy government and degrade religion." *Engel* v. *Vitale*, 370 U. S. 421, 431 (1962). And it seeks to guarantee that government maintains a position of neutrality with respect to religion and neither advances nor inhibits the promulgation and practice of religious beliefs. *Everson* v. *Board of Education*, 330 U. S. 1, 15 (1947) ("Neither [a State nor the Federal Government] can pass laws which aid one religion, aid all religions, or prefer one religion over another"); *Epperson* v. *Arkansas*, 393 U. S. 97, 103–104 (1968); *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U. S. 756, 792–793 (1973). In this regard, we must be alert in our examination of any challenged practice not only for an official establishment of religion, but also for those other evils at which the Clause was aimed—"'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" *Committee for Public Education & Religious Liberty* v. *Nyquist*, *supra*, at 772 (quoting *Walz* v. *Tax Comm'n*, 397 U. S. 664, 668 (1970)).

Applying the three-part test to Pawtucket's crèche, I am persuaded that the city's inclusion of the crèche in its Christmas display simply does not reflect a "clearly secular . . . purpose." *Nyquist*, *supra*, at 773. Unlike the typical case in which the record reveals some contemporaneous expression of a clear purpose to advance religion, see, *e. g.*, *Epperson* v. *Arkansas*, *supra*, at 107–109; *Engel* v. *Vitale*, *supra*, at 423, or, conversely, a clear secular purpose, see, *e. g.*, *Lemon* v. *Kurtzman*, *supra*, at 613; *Wolman* v. *Walter*,

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tool in considering the central question posed in this case—whether Pawtucket has run afoul of the Establishment Clause by endorsing religion through its display of the crèche. *Ante*, at 690.

433 U. S. 229, 236 (1977), here we have no explicit statement of purpose by Pawtucket's municipal government accompanying its decision to purchase, display, and maintain the crèche. Governmental purpose may nevertheless be inferred. For instance, in *Stone* v. *Graham*, 449 U. S. 39, 41 (1980) *(per curiam)*, this Court found, despite the State's avowed purpose of reminding schoolchildren of the secular application of the commands of the Decalogue, that the "preeminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature." In the present case, the city claims that its purposes were exclusively secular. Pawtucket sought, according to this view, only to participate in the celebration of a national holiday and to attract people to the downtown area in order to promote pre-Christmas retail sales and to help engender the spirit of goodwill and neighborliness commonly associated with the Christmas season. Brief for Petitioners 29.

Despite these assertions, two compelling aspects of this case indicate that our generally prudent "reluctance to attribute unconstitutional motives" to a governmental body, *Mueller* v. *Allen*, 463 U. S. 388, 394 (1983), should be overcome. First, as was true in *Larkin* v. *Grendel's Den, Inc.*, 459 U. S. 116, 123–124 (1982), all of Pawtucket's "valid secular objectives can be readily accomplished by other means."[4] Plainly, the city's interest in celebrating the holiday and in promoting both retail sales and goodwill are fully served by the elaborate display of Santa Claus, reindeer, and wishing wells that are already a part of Pawtucket's annual Christmas display.[5] More importantly, the nativity scene, unlike every other element of the Hodgson Park display, reflects a sectarian exclusivity that the avowed purposes of celebrating the holiday season and promoting retail commerce simply do not encompass. To be found constitutional, Pawtucket's seasonal celebration must at least be nondenominational and not serve to promote religion. The inclusion of a distinctively religious element like the crèche, however, demonstrates that a narrower sectarian purpose lay behind the decision to include a nativity scene. That the crèche retained this religious character for the people and municipal government of Pawtucket is suggested by the Mayor's testimony at trial in which he stated that for him, as well as others in the city, the effort to eliminate the nativity scene from Pawtucket's Christmas celebration "is a step towards establishing another religion, non-religion that it may be." App. 100.[6] Plainly, the city and its leaders understood that the inclusion of the crèche in its display would serve the wholly religious purpose of "keep[ing] 'Christ in Christmas.'" 525 F. Supp. 1150, 1173 (RI 1981). From this record, therefore, it is impossible to say with the kind of confidence that was possible in *McGowan* v. *Maryland*, 366 U. S. 420, 445 (1961), that a wholly secular goal predominates.

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[4] I find it puzzling, to say the least, that the Court today should find "irrelevant," *ante*, at 681, n. 7, the fact that the city's secular objectives can be readily and fully accomplished without including the crèche, since only last Term in *Larkin* v. *Grendel's Den, Inc.*, 459 U. S., at 123–124, the Court relied upon precisely the same point in striking down a Massachusetts statute which vested in church governing bodies the power to veto applications for liquor licenses. It seems the Court is willing to alter its analysis from Term to Term in order to suit its preferred results.

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[5] Several representatives of Pawtucket's business community testified that although the overall Christmas display played an important role in promoting downtown holiday trade, the display would serve this purpose equally well even if the crèche were removed. App. 133, 135, 139–140. The Mayor also testified that if the nativity scene had to be eliminated, the city would continue to erect the annual display without it. *Id.*, at 115.

[6] The District Court also admitted into evidence, without objection from petitioners, a considerable amount of correspondence received by Mayor Lynch in support of maintaining the crèche in the city's Christmas display. One such letter, which appears to be representative of the views of many, congratulates the Mayor on his efforts "to keep 'Christ' in Christmas . . . ." App. 161. For the District Court's findings concerning the meaning of these letters, see 525 F. Supp. 1150, 1162 (RI 1981) ("Overall the tenor of the correspondence is that the lawsuit represents an attack on the presence of religion as part of the community's life, an attempt to deny the majority the ability to express publically its beliefs in a desired and traditionally accepted way"). Furthermore, as the District Court found, "the City has accepted and implemented the view of its predominantly Christian citizens that it is a 'good thing' to have a creche in a Christmas display, . . . because it is a good thing to 'keep Christ in Christmas.'" *Id.*, at 1173.

The "primary effect" of including a nativity scene in the city's display is, as the District Court found, to place the government's imprimatur of approval on the particular religious beliefs exemplified by the crèche. Those who believe in the message of the nativity receive the unique and exclusive benefit of public recognition and approval of their views. For many, the city's decision to include the crèche as part of its extensive and costly efforts to celebrate Christmas can only mean that the prestige of the government has been conferred on the beliefs associated with the crèche, thereby providing "a significant symbolic benefit to religion . . . ." *Larkin* v. *Grendel's Den, Inc.*, *supra*, at 125–126. The effect on minority religious groups, as well as on those who may reject all religion, is to convey the message that their views are not similarly worthy of public recognition nor entitled to public support.[7] It was precisely this sort of religious chauvinism that the Establishment Clause was intended forever to prohibit. In this case, as in *Engel* v. *Vitale*, "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." 370 U. S., at 431. Our decision in *Widmar* v. *Vincent*, 454 U. S. 263 (1981), rests upon the same principle. There the Court noted that a state university policy of "equal access" for both secular and religious groups would "not confer any imprimatur of state approval" on the religious groups permitted to use the facilities because "a broad spectrum of groups" would be served and there was no evidence that religious groups would dominate the forum. *Id.*, at 274. Here, by contrast, Pawtucket itself owns the crèche and instead of extending similar attention to a "broad spectrum" of religious and secular groups, it has singled out Christianity for special treatment.

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[7] In this regard, the views expressed by the California Supreme Court in considering a similar issue are particularly relevant:

> "When a city so openly promotes the religious meaning of one religion's holidays, the benefit reaped by that religion and the disadvantage suffered by other religions is obvious. Those persons who do not share those holidays are relegated to the status of outsiders by their own government; those persons who do observe those holidays can take pleasure in seeing the symbol of their belief given official sanction and special status." *Fox* v. *City of Los Angeles*, 22 Cal. 3d, at 803, 587 P. 2d, at 670 (striking down as unconstitutional the erection of an illuminated cross in front of city hall).

See also *Lowe* v. *City of Eugene*, 254 Ore., at 544–546, 463 P. 2d, at 363.

Finally, it is evident that Pawtucket's inclusion of a crèche as part of its annual Christmas display does pose a significant threat of fostering "excessive entanglement." As the Court notes, *ante*, at 683, the District Court found no administrative entanglement in this case, primarily because the city had been able to administer the annual display without extensive consultation with religious officials. See 525 F. Supp., at 1179. Of course, there is no reason to disturb that finding, but it is worth noting that after today's decision, administrative entanglements may well develop. Jews and other non-Christian groups, prompted perhaps by the Mayor's remark that he will include a Menorah in future displays,[8] can be expected to press government for inclusion of their symbols, and faced with such requests, government will have to become involved in accommodating the various demands. Cf. *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U. S., at 796 ("competing efforts [by religious groups] to gain or maintain the support of government" may "occasio[n] considerable civil strife"). More importantly, although no political divisiveness was apparent in Pawtucket prior to the filing of respondents' lawsuit, that act, as the District Court found, unleashed powerful emotional reactions which divided the city along religious lines. 525 F. Supp., at 1180. The fact that calm had prevailed prior to this suit does not immediately suggest the absence of any division on the point for, as the District Court observed, the quiescence of those opposed to the crèche may have reflected nothing more than their sense of futility in opposing the majority. *Id.*, at 1179. Of course, the Court is correct to note that we have never held that the potential for divisiveness alone is sufficient to invalidate a challenged governmental practice; we have, nevertheless, repeatedly emphasized that "too close a proximity" between religious and civil authorities, *Schempp*, 374 U. S., at 259 (BRENNAN, J., concurring), may represent a "warning signal" that the values embodied in the Establishment Clause are at risk. *Committee for Public Education & Religious Liberty* v. *Nyquist*, *supra*, at 798.[9] Furthermore, the Court should not blind itself to the fact that because communities differ in religious composition, the controversy over whether local governments may adopt religious symbols will continue to fester. In many communities, non-Christian groups can be expected to combat practices similar to Pawtucket's; this will be so especially in areas where there are substantial non-Christian minorities.[10]

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[8] See App. 104.

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[9] The suggestion in *Mueller* v. *Allen*, 463 U. S. 388, 403–404, n. 11 (1983), relied upon by the Court today, see *ante*, at 684; *ante*, at 689 (O'CONNOR, J., concurring), that inquiry into potential political divisiveness is unnecessary absent direct subsidies to church-sponsored schools or colleges, derives from a distorted reading of our prior cases. Simply because the Court in *Lemon*—a case involving such subsidies—inquired into potential divisiveness while distinguishing *Everson* and *Allen*—cases not involving such subsidies—does not provide any authority for the proposition that the Court in *Lemon* meant to confine the divisiveness inquiry only to cases factually identical to *Lemon* itself. Indeed, in *Walz*, the Court considered the question of divisiveness in the context of state tax exemptions to all religious institutions. I agree, however, with JUSTICE O'CONNOR's helpful suggestion that while political divisiveness is "an evil addressed by the Establishment Clause," the ultimate inquiry must always focus on "the character of the government activity that might cause such divisiveness." *Ante*, at 689. Having said that, I should also emphasize that I disagree fundamentally with JUSTICE O'CONNOR's apparent conclusion that Pawtucket's inclusion of the crèche is not the kind of governmental act that may engender sharp division along religious lines. The contrary is demonstrated by the history of this case.

In sum, considering the District Court's careful findings of fact under the three-part analysis called for by our prior cases, I have no difficulty concluding that Pawtucket's display of the crèche is unconstitutional.[11]

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[10] This and similar issues relating to governmental endorsement of religious symbols has engendered continuing controversy which has reached the courts on many occasions. See, *e. g.*, *American Civil Liberties Union of Georgia* v. *Rabun County Chamber of Commerce, Inc.*, 698 F. 2d 1098 (CA11 1983); *Florey* v. *Sioux Falls School Dist.*, 619 F. 2d 1311 (CA8 1980); *Allen* v. *Morton*, 161 U. S. App. D. C. 239, 495 F. 2d 65 (1973); *Allen* v. *Hickel*, 138 U. S. App. D. C. 31, 424 F. 2d 944 (1970); *McCreary* v. *Stone*, 575 F. Supp. 1112 (SDNY 1983); *Citizens Concerned for Separation of Church and State* v. *Denver*, 508 F. Supp. 823 (Colo. 1981); *Russell* v. *Mamaroneck*, 440 F. Supp. 607 (SDNY 1977); *Lawrence* v. *Buchmueller*, 40 Misc. 2d 300, 243 N. Y. S. 2d 87 (Sup. Ct. 1963). Given the narrowness of the Court's decision today, see *supra*, at 694–695, and n. 1, the potential for controversy is unlikely to abate.

[11] The Court makes only a halfhearted attempt, see *ante*, at 680–681, 682–683, to grapple with the fact that Judge Pettine's detailed findings may not be overturned unless they are shown to be "clearly erroneous." Fed. Rule Civ. Proc. 52(a). See *Pullman-Standard* v. *Swint*, 456 U. S. 273, 285–290 (1982). In my view, petitioners have made no such showing in this case. JUSTICE O'CONNOR's concurring opinion properly accords greater respect to the District Court's findings, but I am at a loss to understand how the court's specific and well-supported finding that the city was understood to have placed its stamp of approval on the sectarian content of the crèche can, in the face of the *Lemon* test, be dismissed as simply an "error as a matter of law." *Ante*, at 694.

Moreover, although the Court brushes the point aside with little explanation, see *ante*, at 687, n. 13, the *Lemon* decision's three-prong analysis is not the only available standard of review. As the Court of Appeals recognized, the "strict scrutiny" analysis adopted in *Larson* v. *Valente*, 456 U. S., at 244–246, addresses situations in which a governmental policy or

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The Court advances two principal arguments to support its conclusion that the Pawtucket crèche satisfies the *Lemon* test. Neither is persuasive.

First. The Court, by focusing on the holiday "context" in which the nativity scene appeared, seeks to explain away the clear religious import of the crèche and the findings of the District Court that most observers understood the crèche as both a symbol of Christian beliefs and a symbol of the city's support for those beliefs. See *ante*, at 679–684; see also *ante*, at 694 (O'CONNOR, J., concurring). Thus, although the Court concedes that the city's inclusion of the nativity scene plainly serves "to depict the origins" of Christmas as a "significant historical religious event," *ante*, at 681, 680, and that the crèche "is identified with one religious faith," *ante*, at 685, we are nevertheless expected to believe that Pawtucket's use of the crèche does not signal the city's support for the sectarian symbolism that the nativity scene evokes. The effect of the crèche, of course, must be gauged not only by its inherent re-

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practice grants official preference to one religious denomination over another. 691 F. 2d 1029, 1034–1035 (CA1 1982). While I am inclined to agree with the Court of Appeals that Pawtucket's practice fails this test, it is not necessary that I address this point in view of my conclusion that the city's inclusion of the crèche violates the standards fixed in *Lemon*.

Furthermore, I continue to believe that the test I set forth in *Schempp* is an appropriate means of determining whether rights guaranteed by the Establishment Clause have been infringed. In my view, "those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice" must be struck down. 374 U. S., at 294–295. In the present case, I particularly believe the third element of this test is not met, since all of Pawtucket's governmental goals—celebrating the holiday season and promoting commerce—can be fully realized without the use of the crèche by employing such wholly secular means as Santa Claus, reindeer, and cutout figures. See *supra*, at 699–700.

ligious significance but also by the overall setting in which it appears. But it blinks reality to claim, as the Court does, that by including such a distinctively religious object as the crèche in its Christmas display, Pawtucket has done no more than make use of a "traditional" symbol of the holiday, and has thereby purged the crèche of its religious content and conferred only an "incidental and indirect" benefit on religion.

The Court's struggle to ignore the clear religious effect of the crèche seems to me misguided for several reasons. In the first place, the city has positioned the crèche in a central and highly visible location within the Hodgson Park display. The District Court's findings in this regard are unambiguous:

> "[D]espite the small amount of ground covered by the creche, viewers would not regard the creche as an insignificant part of the display. It is an almost life sized tableau marked off by a white picket fence. Furthermore, its location lends the creche significance. The creche faces the Roosevelt Avenue bus stops and access stairs where the bulk of the display is placed. Moreover, the creche is near two of the most enticing parts of the display for children—Santa's house and the talking wishing well. Although the Court recognizes that one cannot see the creche from all possible vantage points, it is clear from the City's own photos that people standing at the two bus shelters and looking down at the display will see the creche centrally and prominently positioned." 525 F. Supp., at 1176–1177 (citations omitted; footnote omitted).

Moreover, the city has done nothing to disclaim government approval of the religious significance of the crèche, to suggest that the crèche represents only one religious symbol among many others that might be included in a seasonal display truly aimed at providing a wide catalog of ethnic and religious celebrations, or to disassociate itself from the religious content of the crèche. In *Abington School Dist.* v. *Schempp*, 374 U. S., at 225, we noted that reading aloud from the Bible would be a permissible schoolroom exercise only if it was "presented objectively as part of a secular program of education" that would remove any message of governmental endorsement of religion. Similarly, when the Court of Appeals for the District of Columbia Circuit approved the inclusion of a crèche as part of a national "Pageant of Peace" on federal parkland adjacent to the White House, it did so on the express condition that the Government would erect "explanatory plaques" disclaiming any sponsorship of religious beliefs associated with the crèche. *Allen* v. *Morton*, 161 U. S. App. D. C. 239, 241–242, 495 F. 2d 65, 67–68 (1973) *(per curiam)*. In this case, by contrast, Pawtucket has made no effort whatever to provide a similar cautionary message.

Third, we have consistently acknowledged that an otherwise secular setting alone does not suffice to justify a governmental practice that has the effect of aiding religion. In *Hunt* v. *McNair*, 413 U. S. 734, 743 (1973), for instance, we observed that "[a]id normally may be thought to have a primary effect of advancing religion . . . when it [supports] a specifically religious activity in an otherwise substantially secular setting." The demonstrably secular context of public education, therefore, did not save the challenged practice of school prayer in *Engel* or in *Schempp*. Similarly, in *Tilton* v. *Richardson*, 403 U. S. 672, 683 (1971), despite the generally secular thrust of the financing legislation under review, the Court unanimously struck down that aspect of the program which permitted church-related institutions eventually to assume total control over the use of buildings constructed with federal aid.[12]

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[12] Indeed, in the aid-to-sectarian-schools cases, the state financing schemes under review almost always require us to focus on a specific element that may violate the Establishment Clause, even though it is a part of a complex and otherwise secular statutory framework. See, *e. g.*, *Meek* v. *Pittenger*, 421 U. S. 349 (1975); *Wolman* v. *Walter*, 433 U. S. 229 (1977). See also *Committee for Public Education & Religious Liberty* v. *Regan*, 444 U. S. 646, 662 (1980) (BLACKMUN, J., dissenting).

Finally, and most importantly, even in the context of Pawtucket's seasonal celebration, the crèche retains a specifically Christian religious meaning. I refuse to accept the notion implicit in today's decision that non-Christians would find that the religious content of the crèche is eliminated by the fact that it appears as part of the city's otherwise secular celebration of the Christmas holiday. The nativity scene is clearly distinct in its purpose and effect from the rest of the Hodgson Park display for the simple reason that it is the only one rooted in a biblical account of Christ's birth. It is the chief symbol of the characteristically Christian belief that a divine Savior was brought into the world and that the purpose of this miraculous birth was to illuminate a path toward salvation and redemption.[13] For Christians, that path is exclusive, precious, and holy. But for those who do not share these beliefs, the symbolic reenactment of the birth of a divine being who has been miraculously incarnated as a man stands as a dramatic reminder of their differences with Christian faith.[14] When government appears to sponsor such religiously inspired views, we cannot say that the practice is "'so separate and so indisputably marked off from the religious function,' . . . that [it] may fairly be viewed as reflect[ing] a neutral posture toward religious institutions." *Nyquist*, 413 U. S., at 782 (quoting *Everson*, 330 U. S., at 18). To be so excluded on religious grounds by one's elected government is an insult and an injury that, until today, could not be countenanced by the Establishment Clause.

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[13] See R. Brown, The Birth of the Messiah (1977); W. Auld, Christmas Traditions (1931); A. McArthur, The Evolution of the Christian Year (1953).

[14] For Christians, of course, the essential message of the nativity is that God became incarnate in the person of Christ. But just as fundamental to Jewish thought is the belief in the "non-incarnation of God, . . . [t]he God in whom [Jews] believe, to whom [Jews] are pledged, does not unite with human substance on earth." M. Buber, Israel and the World (1948) (reprinted in F. Talmage, Disputation and Dialogue: Readings in the Jewish-Christian Encounter 281–282 (1975)) (emphasis deleted). This distinction, according to Buber, "constitute[s] the ultimate division between Judaism and Christianity." *Id.*, at 281. See also R. Reuther, Faith and Fratricide 246 (1974).

Similarly, those who follow the tenets of Unitarianism might well find Pawtucket's support for the symbolism of the crèche, which highlights the Trinitarian tradition in Christian faith, to be an affront to their belief in a single divine being. See J. Williams, What Americans Believe and How They Worship 316–317 (3d ed. 1969). See also C. Olmstead, History of Religion in the United States 296–299 (1960).

Second. The Court also attempts to justify the crèche by entertaining a beguilingly simple, yet faulty syllogism. The Court begins by noting that government may recognize Christmas Day as a public holiday; the Court then asserts that the crèche is nothing more than a traditional element of Christmas celebrations; and it concludes that the inclusion of a crèche as part of a government's annual Christmas celebration is constitutionally permissible. See *ante*, at 680–683, 685–686; see also *ante*, at 692–694 (O'CONNOR, J., concurring). The Court apparently believes that once it finds that the designation of Christmas as a public holiday is constitutionally acceptable, it is then free to conclude that virtually every form of governmental association with the celebration of the holiday is also constitutional. The vice of this dangerously superficial argument is that it overlooks the fact that the Christmas holiday in our national culture contains both secular and sectarian elements.[15] To say that government may recognize the holiday's traditional, secular elements of gift-giving, public festivities, and community spirit, does not mean that government may indiscriminately embrace the distinctively sectarian aspects of the holiday. Indeed, in its eagerness to approve the crèche, the Court has advanced a rationale so simplistic that it would appear to allow the Mayor of Pawtucket to participate in the celebration of a Christmas Mass, since this would be just another unobjectionable way for the city to "celebrate the holiday." As is demonstrated below, the Court's logic is fundamentally flawed both because it obscures the reason why public designation of Christmas Day as a holiday is constitutionally acceptable, and blurs the distinction between the secular aspects of Christmas and its distinctively religious character, as exemplified by the crèche.

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[15] Both the District Court and the Court of Appeals recognized that Christmas comprises both secular and sectarian elements and that this distinction is of constitutional importance. See 525 F. Supp., at 1163–1164; 691 F. 2d, at 1032–1033; *id.*, at 1035–1037 (Bownes, J., concurring). In addition, many observers have explained that historically the Christmas celebration derives both from traditional, folk elements such as gift-giving and winter seasonal celebrations, as well as from Christian religious elements. See, *e. g.*, J. Barnett, The American Christmas, A Study in National Culture 9–14 (1954) (hereafter Barnett); R. Meyers, Celebrations: The Complete Book of American Holidays 309–344 (1972); B. Rosenthal & N. Rosenthal, Christmas 14–15 (1980).

When government decides to recognize Christmas Day as a public holiday, it does no more than accommodate the calendar of public activities to the plain fact that many Americans will expect on that day to spend time visiting with their families, attending religious services, and perhaps enjoying some respite from preholiday activities. The Free Exercise Clause, of course, does not necessarily compel the government to provide this accommodation, but neither is the Establishment Clause offended by such a step. Cf. *Zorach* v. *Clauson*, 343 U. S. 306 (1952). Because it is clear that the celebration of Christmas has both secular and sectarian elements, it may well be that by taking note of the holiday, the government is simply seeking to serve the same kinds of wholly secular goals—for instance, promoting goodwill and a common day of rest—that were found to justify Sunday Closing Laws in *McGowan* v. *Maryland*, 366 U. S. 420 (1961).[16] If public officials go further and participate in the *secular* celebration of Christmas—by, for example, decorating public places with such secular images as wreaths, garlands, or Santa Claus figures—they move closer to the limits of their constitutional power but nevertheless remain within the boundaries set by the Establishment Clause. But when those officials participate in or appear to endorse the distinctively religious elements of this otherwise secular event, they encroach upon First Amendment freedoms. For it is at that point that the government brings to the forefront the theological content of the holiday, and places the prestige, power, and financial support of a civil authority in the service of a particular faith.

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[16] It is worth noting that Christmas shares the list of federal holidays with such patently secular, patriotic holidays as the Fourth of July, Memorial Day, Washington's Birthday, Labor Day, and Veterans Day. See 5 U. S. C. § 6103(a). We may reasonably infer from the distinctly secular character of the company that Christmas keeps on this list that it too is included for essentially secular reasons.

The inclusion of a crèche in Pawtucket's otherwise secular celebration of Christmas clearly violates these principles. Unlike such secular figures as Santa Claus, reindeer, and carolers, a nativity scene represents far more than a mere "traditional" symbol of Christmas. The essence of the crèche's symbolic purpose and effect is to prompt the observer to experience a sense of simple awe and wonder appropriate to the contemplation of one of the central elements of Christian dogma—that God sent His Son into the world to be a Messiah.[17] Contrary to the Court's suggestion, the crèche is far from a mere representation of a "particular historic religious event." *Ante*, at 686. It is, instead, best understood as a mystical re-creation of an event that lies at the heart of Christian faith.[18] To suggest, as the Court does, that such a symbol is merely "traditional" and therefore no different from Santa's house or reindeer is not only offensive to those for whom the crèche has profound significance,[19] but insulting to those who insist for religious or personal reasons that the story of Christ is in no sense a part of "history" nor an unavoidable element of our national "heritage."[20]

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[17] See W. Auld, Christmas Traditions (1931); A. McArthur, The Evolution of the Christian Year (1953).

[18] As one commentator has observed: "Today of course it is admitted even by Catholic exegetes that [the Biblical stories recounting Christ's birth] are a collection of largely uncertain, mutually contradictory, strongly legendary and ultimately theologically motivated narratives, with a character of their own. Unlike the rest of Jesus' life, there are dream happenings here and angels constantly enter on the scene and leave it—as heavenly messengers of God announcing important events." H. Kung, On Being A Christian 451 (E. Quinn trans., 1976) (footnote omitted). See also R. Brown, The Birth of the Messiah 25–41 (1977); Elliott, The Birth and Background of Jesus of Nazareth, 28 History Today 773, 774–780 (1978).

For these reasons, the crèche in this context simply cannot be viewed as playing the same role that an ordinary museum display does. See *ante*, at 676–677, 683, 685. The Court seems to assume that prohibiting Pawtucket from displaying a crèche would be tantamount to prohibiting a state college from including the Bible or Milton's Paradise Lost in a course on English literature. But in those cases the religiously inspired materials are being considered solely as literature. The purpose is plainly not to single out the particular religious beliefs that may have inspired the authors, but to see in these writings the outlines of a larger imaginative universe shared with other forms of literary expression.[21] The same may be said of a course devoted to the study of art; when the course turns to Gothic architecture, the emphasis is not on the religious beliefs which the cathedrals exalt, but rather upon the "aesthetic consequences of [such religious] thought."[22]

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[19] Many Christian commentators have voiced strong objections to what they consider to be the debasement and trivialization of Christmas through too close a connection with commercial and public celebrations. See, *e. g.*, Kelley, Beyond Separation of Church and State, 5 J. Church & State 181 (1963). See generally Barnett 55–57.

[20] See A. Stokes & L. Pfeffer, Church and State in the United States 383 (rev. ed. 1964); R. Morgan, The Supreme Court and Religion 126 (1972); Barnett 68 (discussing opposition by Jews and other non-Christian religious groups to public celebrations of Christmas). See also Talmage, *supra* n. 14.

[21] See N. Frye, The Secular Scripture 14–15 (1976).

[22] O. von Simson, The Gothic Cathedral 27 (1956). See also E. Panofsky, Meaning in the Visual Arts (1974). Compare Justice Jackson's explanation of his view that the study of religiously inspired material can, in the correct

In this case, by contrast, the crèche plays no comparable secular role. Unlike the poetry of Paradise Lost which students in a literature course will seek to appreciate primarily for esthetic or historical reasons, the angels, shepherds, Magi, and infant of Pawtucket's nativity scene can only be viewed as symbols of a particular set of religious beliefs. It would be another matter if the crèche were displayed in a museum setting, in the company of other religiously inspired artifacts, as an example, among many, of the symbolic representation of religious myths. In that setting, we would have objective guarantees that the crèche could not suggest that a particular faith had been singled out for public favor and recognition. The effect of Pawtucket's crèche, however, is not confined by any of these limiting attributes. In the absence of any other religious symbols or of any neutral disclaimer, the inescapable effect of the crèche will be to remind the average observer of the religious roots of the celebration he is witnessing and to call to mind the scriptural message that the nativity symbolizes. The fact that Pawtucket has gone to the trouble of making such an elaborate public celebration and of including a crèche in that otherwise secular setting inevitably serves to reinforce the sense that the city means to express solidarity with the Christian message of the crèche and to dismiss other faiths as unworthy of similar attention and support.

II

Although the Court's relaxed application of the *Lemon* test to Pawtucket's crèche is regrettable, it is at least understandable and properly limited to the particular facts of this case. The Court's opinion, however, also sounds a broader

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setting, be made a part of a secular educational program: "[m]usic without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view." *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 203, 236 (1948) (concurring opinion).

and more troubling theme. Invoking the celebration of Thanksgiving as a public holiday, the legend "In God We Trust" on our coins, and the proclamation "God save the United States and this Honorable Court" at the opening of judicial sessions, the Court asserts, without explanation, that Pawtucket's inclusion of a crèche in its annual Christmas display poses no more of a threat to Establishment Clause values than these other official "acknowledgments" of religion. *Ante*, at 674–678, 685–686; see also *ante*, at 692–693 (O'CONNOR, J., concurring).

Intuition tells us that some official "acknowledgment" is inevitable in a religious society if government is not to adopt a stilted indifference to the religious life of the people. See *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 203, 232 (1948) (Jackson, J., concurring). It is equally true, however, that if government is to remain scrupulously neutral in matters of religious conscience, as our Constitution requires, then it must avoid those overly broad acknowledgments of religious practices that may imply governmental favoritism toward one set of religious beliefs. This does not mean, of course, that public officials may not take account, when necessary, of the separate existence and significance of the religious institutions and practices in the society they govern. Should government choose to incorporate some arguably religious element into its public ceremonies, that acknowledgment must be impartial; it must not tend to promote one faith or handicap another; and it should not sponsor religion generally over nonreligion. Thus, in a series of decisions concerned with such acknowledgments, we have repeatedly held that any active form of public acknowledgment of religion indicating sponsorship or endorsement is forbidden. *E. g.*, *Stone* v. *Graham*, 449 U. S. 39 (1980) (posting of Ten Commandments in schoolroom); *Epperson* v. *Arkansas*, 393 U. S. 97 (1968) (prohibition on teaching principles of Darwinian evolution); *Abington School Dist.* v. *Schempp*, 374 U. S. 203 (1963) (mandatory Bible-reading at beginning of school day); *Engel* v. *Vitale*, 370 U. S. 421 (1962) (mandatory reading of state-composed prayer); *Illinois ex rel. McCollum* v. *Board of Education*, *supra* (use of public-school facilities for religious instruction).

Despite this body of case law, the Court has never comprehensively addressed the extent to which government may acknowledge religion by, for example, incorporating religious references into public ceremonies and proclamations, and I do not presume to offer a comprehensive approach. Nevertheless, it appears from our prior decisions that at least three principles—tracing the narrow channels which government acknowledgments must follow to satisfy the Establishment Clause—may be identified. First, although the government may not be compelled to do so by the Free Exercise Clause, it may, consistently with the Establishment Clause, act to accommodate to some extent the opportunities of individuals to practice their religion. See *Schempp*, *supra*, at 296–299 (BRENNAN, J., concurring). That is the essential meaning, I submit, of this Court's decision in *Zorach* v. *Clauson*, 343 U. S. 306 (1952), finding that government does not violate the Establishment Clause when it simply chooses to "close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction." *Id.*, at 314. And for me that principle would justify government's decision to declare December 25th a public holiday. See *supra*, at 710.

Second, our cases recognize that while a particular governmental practice may have derived from religious motivations and retain certain religious connotations, it is nonetheless permissible for the government to pursue the practice when it is continued today solely for secular reasons. As this Court noted with reference to Sunday Closing Laws in *McGowan* v. *Maryland*, 366 U. S. 420 (1961), the mere fact that a governmental practice coincides to some extent with certain religious beliefs does not render it unconstitutional. Thanksgiving Day, in my view, fits easily within this principle, for despite its religious antecedents,[23] the current practice of celebrating Thanksgiving is unquestionably secular and patriotic. We all may gather with our families on that day to give thanks both for personal and national good fortune, but we are free, given the secular character of the holiday, to address that gratitude either to a divine beneficence or to such mundane sources as good luck or the country's abundant natural wealth.

Finally, we have noted that government cannot be completely prohibited from recognizing in its public actions the religious beliefs and practices of the American people as an aspect of our national history and culture. See *Engel* v. *Vitale*, *supra*, at 435, n. 21; *Schempp*, *supra*, at 300–304 (BRENNAN, J., concurring). While I remain uncertain about these questions, I would suggest that such practices as the designation of "In God We Trust" as our national motto, or the references to God contained in the Pledge of Allegiance to the flag can best be understood, in Dean Rostow's apt phrase, as a form a "ceremonial deism,"[24] protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content. See *Marsh* v. *Chambers*, 463 U. S., at 818 (BRENNAN, J., dissenting).

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[23] The constitutional problems posed by the religious antecedents of the early Thanksgiving celebrations were well recognized by Thomas Jefferson. Refusing on Establishment Clause grounds to declare national days of thanksgiving or fasting, Jefferson explained:

> "I consider the government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, disciplines, or exercises. . . . [I]t is only proposed that I should recommend, not prescribe a day of fasting and prayer . . . [But] I do not believe it is for the interest of religion to invite the civil magistrate to direct its exercises, its discipline, or its doctrines . . . . Fasting and prayer are religious exercises; the enjoining them an act of discipline." 11 Jefferson's Writings 428–430 (1904) (emphasis deleted).

See generally L. Pfeffer, Church, State and Freedom 266 (1967).

[24] Sutherland, Book Review, 40 Ind. L. J. 83, 86 (1964) (quoting Dean Rostow's 1962 Meiklejohn Lecture delivered at Brown University).

Moreover, these references are uniquely suited to serve such wholly secular purposes as solemnizing public occasions, or inspiring commitment to meet some national challenge in a manner that simply could not be fully served in our culture if government were limited to purely nonreligious phrases. Cf. *Schempp*, *supra*, at 265 (BRENNAN, J., concurring). The practices by which the government has long acknowledged religion are therefore probably necessary to serve certain secular functions, and that necessity, coupled with their long history, gives those practices an essentially secular meaning.

The crèche fits none of these categories. Inclusion of the crèche is not necessary to accommodate individual religious expression. This is plainly not a case in which individual residents of Pawtucket have claimed the right to place a crèche as part of a wholly private display on public land. Cf. *Widmar* v. *Vincent*, 454 U. S. 263 (1981); *McCreary* v. *Stone*, 575 F. Supp. 1112 (SDNY 1983). Nor is the inclusion of the crèche necessary to serve wholly secular goals; it is clear that the city's secular purposes of celebrating the Christmas holiday and promoting retail commerce can be fully served without the crèche. Cf. *McGowan* v. *Maryland*, and *supra*, at 699–700. And the crèche, because of its unique association with Christianity, is clearly more sectarian than those references to God that we accept in ceremonial phrases or in other contexts that assure neutrality. The religious works on display at the National Gallery, Presidential references to God during an Inaugural Address, or the national motto present no risk of establishing religion. To be sure, our understanding of these expressions may begin in contemplation of some religious element, but it does not end there. Their message is dominantly secular. In contrast, the message of the crèche begins and ends with reverence for a particular image of the divine.

By insisting that such a distinctively sectarian message is merely an unobjectionable part of our "religious heritage," see *ante*, at 676, 685–686, the Court takes a long step backwards to the days when Justice Brewer could arrogantly declare for the Court that "this is a Christian nation." *Church of Holy Trinity* v. *United States*, 143 U. S. 457, 471 (1892). Those days, I had thought, were forever put behind us by the Court's decision in *Engel* v. *Vitale*, in which we rejected a similar argument advanced by the State of New York that its Regent's Prayer was simply an acceptable part of our "spiritual heritage." 370 U. S., at 425.

III

The American historical experience concerning the public celebration of Christmas, if carefully examined, provides no support for the Court's decision. The opening sections of the Court's opinion, while seeking to rely on historical evidence, do no more than recognize the obvious: because of the strong religious currents that run through our history, an inflexible or absolutistic enforcement of the Establishment Clause would be both imprudent and impossible. See *ante*, at 673–678. This observation is at once uncontroversial and unilluminating. Simply enumerating the various ways in which the Federal Government has recognized the vital role religion plays in our society does nothing to help decide the question presented in *this* case.

Indeed, the Court's approach suggests a fundamental misapprehension of the proper uses of history in constitutional interpretation. Certainly, our decisions reflect the fact that an awareness of historical practice often can provide a useful guide in interpreting the abstract language of the Establishment Clause. See, *e. g.*, *Walz* v. *Tax Comm'n*, 397 U. S., at 676–680; *McGowan* v. *Maryland*, 366 U. S., at 431–445; *Engel*, 370 U. S., at 425–429. But historical acceptance of a particular practice alone is never sufficient to justify a challenged governmental action, since, as the Court has rightly observed, "no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it." *Walz*, *supra*, at 678. See also *Committee for*

Public Education & Religious Liberty v. *Nyquist*, 413 U. S., at 792. Attention to the details of history should not blind us to the cardinal purposes of the Establishment Clause, nor limit our central inquiry in these cases—whether the challenged practices "threaten those consequences which the Framers deeply feared." *Abington School Dist.* v. *Schempp*, 374 U. S., at 236 (BRENNAN, J., concurring). In recognition of this fact, the Court has, until today, consistently limited its historical inquiry to the particular practice under review.

In *McGowan*, for instance, the Court carefully canvassed the entire history of Sunday Closing Laws from the colonial period up to modern times. On the basis of this analysis, we concluded that while such laws were rooted in religious motivations, the current purpose was to serve the wholly secular goal of providing a uniform day of rest for all citizens. 366 U. S., at 445. Our inquiry in *Walz* was similarly confined to the special history of the practice under review. There the Court found a pattern of "undeviating acceptance" over the entire course of the Nation's history of according property-tax exemptions to religious organizations, a pattern which supported our finding that the practice did not violate the Religion Clauses. Finally, where direct inquiry into the Framers' intent reveals that the First Amendment was not understood to prohibit a particular practice, we have found such an understanding compelling. Thus, in *Marsh* v. *Chambers*, after marshaling the historical evidence which indicated that the First Congress had authorized the appointment of paid chaplains for its own proceedings only three days before it reached agreement on the final wording of the Bill of Rights, the Court concluded on the basis of this "unique history" that the modern-day practice of opening legislative sessions with prayer was constitutional. 463 U. S., at 787–791.

Although invoking these decisions in support of its result, the Court wholly fails to discuss the history of the public celebration of Christmas or the use of publicly displayed nativity scenes. The Court, instead, simply asserts, without any historical analysis or support whatsoever, that the now familiar celebration of Christmas springs from an unbroken history of acknowledgment "by the people, by the Executive Branch, by the Congress, and the courts for 2 centuries . . . ." *Ante*, at 686. The Court's complete failure to offer any explanation of its assertion is perhaps understandable, however, because the historical record points in precisely the opposite direction. Two features of this history are worth noting. First, at the time of the adoption of the Constitution and the Bill of Rights, there was no settled pattern of celebrating Christmas, either as a purely religious holiday or as a public event. Second, the historical evidence, such as it is, offers no uniform pattern of widespread acceptance of the holiday and indeed suggests that the development of Christmas as a public holiday is a comparatively recent phenomenon.[25]

The intent of the Framers with respect to the public display of nativity scenes is virtually impossible to discern primarily because the widespread celebration of Christmas did not emerge in its present form until well into the 19th century. Carrying a well-defined Puritan hostility to the celebration of Christ's birth with them to the New World, the founders of the Massachusetts Bay Colony pursued a vigilant policy of opposition to any public celebration of the holiday.

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[25] The Court's insistence upon pursuing this vague historical analysis is especially baffling since even the petitioners and their supporting *amici* concede that no historical evidence equivalent to that relied upon in *Marsh*, *McGowan*, or *Walz* supports publicly sponsored Christmas displays. At oral argument, counsel for petitioners was asked whether there is "anything we can refer to to let us know how long it has been the practice in this country for public bodies to have nativity scenes displayed?" Counsel responded: "Specifically, I cannot . . . . The recognition of Christmas [as a public holiday] began in the middle part of the last century . . . but specifically with respect to the use of the nativity scene, we have been unable to locate that data." Tr. of Oral Arg. 8.

In addition, the Solicitor General, appearing as *amicus* in support of petitioners, was asked: "Do we have . . . evidence [of the intent of the Framers] here with respect to the display of a nativity scene?" He responded: "Not with that degree of specificity." *Id.*, at 22–23.

To the Puritans, the celebration of Christmas represented a "Popish" practice lacking any foundation in Scripture. This opposition took legal form in 1659 when the Massachusetts Bay Colony made the observance of Christmas Day, "by abstinence from labor, feasting, or any other way," an offense punishable by fine. Although the Colony eventually repealed this ban in 1681, the Puritan objection remained firm.[26]

During the 18th century, sectarian division over the celebration of the holiday continued. As increasing numbers of members of the Anglican and the Dutch and German Reformed Churches arrived, the practice of celebrating Christmas as a purely religious holiday grew. But denominational differences continued to dictate differences in attitude toward the holiday. American Anglicans, who carried with them the Church of England's acceptance of the holiday, Roman Catholics, and various German groups all made the celebration of Christmas a vital part of their religious life. By contrast, many nonconforming Protestant groups, including the Presbyterians, Congregationalists, Baptists, and Methodists, continued to regard the holiday with suspicion and antagonism well into the 19th century.[27] This pattern of sec-

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[26] See S. Cobb, The Rise of Religious Liberty in America 209 (rev. ed. 1970). For an example of this notorious Puritan antipathy to the holiday, consider the remarks of Judge Sewell, a Puritan, who in 1685 expressed his concerns about the influence of public celebration of Christmas: "Some, somehow observe the day, but are vexed, I believe, that the Body of the People Profane it; and, blessed be God, no Authority yet to compel them to keep it." Quoted in Barnett 3.

[27] See generally Barnett 4–6, 21–22; Sweet, Christmas in American History, 22 Chi. Theol. Sem. Register 12, 14 (Nov. 1932); R. Meyers, Celebrations: The Complete Book of American Holidays 314–315 (1972). Some indication of this denominational opposition to the religious celebration of Christmas can be gleaned from the following account of Christmas services in the New York Daily Times for December 26, 1855:

"The churches of the Presbyterians, Baptists and Methodists were not open on Dec. 25 except where some Mission Schools had a celebration. They do not accept the day as a Holy One, but the Episcopalian, Catholic tarian division concerning the holiday suggests that for the Framers of the Establishment Clause, who were acutely sensitive to such sectarian controversies, no single view of how government should approach the celebration of Christmas would be possible.

Many of the same religious sects that were devotedly opposed to the celebration of Christmas on purely religious grounds, were also some of the most vocal and dedicated foes of established religions in the period just prior to the Revolutionary War.[28] The Puritans, and later the Presbyterians, Baptists, and Methodists, generally associated the celebration of Christmas with the elaborate and, in their view, sacreligious celebration of the holiday by the Church of England, and also with, for them, the more sinister theology of "Popery."[29] In the eyes of these dissenting religious sects, therefore, the groups most closely associated with estab-

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and German Churches were all open. Inside they were decked with evergreens." Quoted in Barnett 8.

In addition, consider the account written in 1874 of Henry Ward Beecher, a Congregationalist, describing his New England childhood:

"To me Christmas is a foreign day, and I shall die so. When I was a boy I wondered what Christmas was. I knew there was such a time, because we had an Episcopal church in our town and I saw them dressing it with evergreens . . . . A little later I understood it was a Romish institution, kept up by the Romish Church. Brought up in the strictest state of New England, brought up in the most literal style of worship . . . I passed all my youth without any knowledge of Christmas, and so I have no associations with the day." Quoted in Meyers, *supra* n. 15, at 315–316.

[28] The role of these religious groups in the struggle for disestablishment and their place in the history of the Establishment Clause have already been chronicled at some length in our cases, and therefore I will not repeat that history here. See *Everson* v. *Board of Education,* 330 U. S. 1, 9–15 (1947); *Engel* v. *Vitale,* 370 U. S. 421, 428, and n. 10 (1962); *Committee for Public Education & Religious Liberty* v. *Nyquist,* 413 U. S., at 770, and n. 28. For more comprehensive discussions of the efforts of these denominations to bring about disestablishment, see S. Cobb, The Rise of Religious Liberty in America (rev. ed. 1970); B. Bailyn, The Ideological Origins of the American Revolution 257-263 (1967); W. McLoughlin, New England Dissent: 1630–1833 (1971); L. Pfeffer, Church, State and Freedom (1967).

[29] See Barnett 2–6.

lished religion—the Churches of England and of Rome—were also most closely linked to the profane practice of publicly celebrating Christmas. For those who authored the Bill of Rights, it seems reasonable to suppose that the public celebration of Christmas would have been regarded as at least a sensitive matter, if not deeply controversial. As we have repeatedly observed, the Religion Clauses were intended to ensure a benign regime of competitive disorder among all denominations, so that each sect was free to vie against the others for the allegiance of its followers without state interference. See *Everson* v. *Board of Education*, 330 U. S. 1 (1947). The historical record, contrary to the Court's uninformed assumption, suggests that at the very least conflicting views toward the celebration of Christmas were an important element of that competition at the time of the adoption of the Constitution.

Furthermore, unlike the religious tax exemptions upheld in *Walz*, the public display of nativity scenes as part of governmental celebrations of Christmas does not come to us supported by an unbroken history of widespread acceptance. It was not until 1836 that a State first granted legal recognition to Christmas as a public holiday. This was followed in the period between 1845 and 1865, by 28 jurisdictions which included Christmas Day as a legal holiday.[30] Congress did not follow the States' lead until 1870 when it established December 25th, along with the Fourth of July, New Year's Day, and Thanksgiving, as a legal holiday in the District of Columbia.[31] This pattern of legal recognition tells us only that public acceptance of the holiday was gradual and that the practice—in stark contrast to the record presented in either *Walz* or *Marsh*—did not take on the character of a widely recognized holiday until the middle of the 19th century.

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[30] For a compilation of these developments, see *id.*, at 19–20.

[31] Ch. 167, 16 Stat. 168. There is no suggestion in the brief congressional discussion concerning the decision to declare Christmas Day a public holiday in the District of Columbia, that Congress meant to do anything more than to put the District on equal footing with the many States that had declared those days public holidays by that time. See Cong. Globe, 41st Cong., 2d Sess., 4805 (1870).

Significantly, it was not until 1885 that Congress provided holiday payment for federal employees on December 25. See J. Res. 5, 23 Stat. 516.

The historical evidence with respect to public financing and support for governmental displays of nativity scenes is even more difficult to gauge. What is known suggests that German immigrants who settled in Pennsylvania early in the 18th century, presumably drawing upon European traditions, were probably the first to introduce nativity scenes to the American celebration of Christmas.[32] It also appears likely that this practice expanded as more Roman Catholic immigrants settled during the 19th century. From these modest beginnings, the familiar crèche scene developed and gained wider recognition by the late 19th century.[33] It is simply impossible to tell, however, whether the practice ever gained widespread acceptance, much less official endorsement, until the 20th century.

In sum, there is no evidence whatsoever that the Framers would have expressly approved a federal celebration of the Christmas holiday including public displays of a nativity scene; accordingly, the Court's repeated invocation of the decision in *Marsh*, see *ante*, at 673–674, 682, 685–686, is not only baffling, it is utterly irrelevant. Nor is there any suggestion that publicly financed and supported displays of Christmas crèches are supported by a record of widespread, undeviating acceptance that extends throughout our history. Therefore, our prior decisions which relied upon concrete, specific historical evidence to support a particular practice simply have no bearing on the question presented in this case. Contrary to today's careless decision, those prior cases have all recognized that the "illumination" provided by history must always be focused on the particular practice at issue in a given case. Without that guiding principle and the intellectual discipline it imposes, the Court is at sea, free to select random elements of America's varied history solely to suit the views of five Members of this Court.

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[32] See Barnett 11–12; Meyers, *supra* n. 15. The symbol of the crèche as an artifact of Christmas celebration apparently owes its origins to St. Francis of Assisi who, according to most accounts, first popularized the ritual re-enactment of the birth of Christ by erecting a manger attended by townspeople who played the now-traditional roles of shepherds, Magi, etc., in the village of Greccio, Italy, in 1224. See W. Auld, Christmas Traditions 56 (1931); M. Krythe, All About Christmas 85 (1954).

[33] One commentator has noted that the increasing secularization of the Christmas celebration which occurred during the 19th century led "members of the Puritan and evangelical churches [to be] less inclined to oppose the secular celebration when it no longer symbolized the religious and political dominance of the Church of England. This tolerance increased during the nineteenth century and undoubtedly encouraged [the] popularity [of the celebration of Christmas]." Barnett 6; see also *id.*, at 11–12, 22–23.

IV

Under our constitutional scheme, the role of safeguarding our "religious heritage" and of promoting religious beliefs is reserved as the exclusive prerogative of our Nation's churches, religious institutions, and spiritual leaders. Because the Framers of the Establishment Clause understood that "religion is too personal, too sacred, too holy to permit its 'unhallowed perversion' by civil [authorities]," *Engel* v. *Vitale*, 370 U. S., at 432, the Clause demands that government play no role in this effort. The Court today brushes aside these concerns by insisting that Pawtucket has done nothing more than include a "traditional" symbol of Christmas in its celebration of this national holiday, thereby muting the religious content of the crèche. *Ante*, at 685. But the city's action should be recognized for what it is: a coercive, though perhaps small, step toward establishing the sectarian preferences of the majority at the expense of the minority, accomplished by placing public facilities and funds in support of the religious symbolism and theological tidings that the crèche conveys. As Justice Frankfurter, writing in *McGowan* v. *Maryland*, observed, the Establishment Clause "withdr[aws] from the sphere of legitimate legislative concern and competence a specific, but comprehensive, area of human conduct: man's belief or disbelief in the verity of some transcendental idea and man's expression in action of that belief or disbelief." 366 U. S., at 465–466 (separate opinion). That the Constitution sets this realm of thought and feeling apart from the pressures and antagonisms of government is one of its supreme achievements. Regrettably, the Court today tarnishes that achievement.

I dissent.

JUSTICE BLACKMUN, with whom JUSTICE STEVENS joins, dissenting.

As JUSTICE BRENNAN points out, the logic of the Court's decision in *Lemon* v. *Kurtzman*, 403 U. S. 602, 612–613 (1971) (which THE CHIEF JUSTICE would say has been applied by this Court "often," *ante*, at 679, but which JUSTICE O'CONNOR acknowledges with the words, "Our prior cases have used the three-part test articulated in *Lemon*," *ante*, at 688), *compels* an affirmance here. If that case and its guidelines mean anything, the presence of Pawtucket's crèche in a municipally sponsored display must be held to be a violation of the First Amendment.

Not only does the Court's resolution of this controversy make light of our precedents, but also, ironically, the majority does an injustice to the crèche and the message it manifests. While certain persons, including the Mayor of Pawtucket, undertook a crusade to "keep 'Christ' in Christmas," App. 161, the Court today has declared that presence virtually irrelevant. The majority urges that the display, "with or without a crèche," "recall[s] the religious nature of the Holiday," and "engenders a friendly community spirit of goodwill in keeping with the season." *Ante*, at 685. Before the District Court, an expert witness for the city made a similar, though perhaps more candid, point, stating that Pawtucket's display invites people "to participate in the Christmas spirit, brotherhood, peace, and let loose with their money." See 525 F. Supp. 1150, 1161 (RI 1981). The crèche has been relegated to the role of a neutral harbinger of the holiday season, useful for commercial purposes, but devoid of any inherent meaning and incapable of enhancing the religious tenor of a display of which it is an integral part. The city has its victory—but it is a Pyrrhic one indeed.

The import of the Court's decision is to encourage use of the crèche in a municipally sponsored display, a setting where Christians feel constrained in acknowledging its symbolic meaning and non-Christians feel alienated by its presence. Surely, this is a misuse of a sacred symbol. Because I cannot join the Court in denying either the force of our precedents or the sacred message that is at the core of the crèche, I dissent and join JUSTICE BRENNAN's opinion.

HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* MATHEWS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

No. 82-1050. Argued December 5, 1983—Decided March 5, 1984

Prior to 1977, spousal benefits under the Social Security Act (Act) were payable only to husbands or widowers who could demonstrate dependency on their wives for one-half of their support, whereas wives and widows were entitled to benefits without any such showing of dependency on their husbands. In *Califano* v. *Goldfarb*, 430 U. S. 199, this Court affirmed a District Court judgment holding that the gender-based dependency requirement for widowers violated the equal protection component of the Due Process Clause of the Fifth Amendment. Thereafter, while repealing the dependency requirement for widowers and husbands, Congress, in order to avoid a fiscal drain on the Social Security trust fund, enacted a "pension offset" provision that generally requires the reduction of spousal benefits by the amount of Federal or State Government pensions received by the Social Security applicant. However, in order to protect the interests of those individuals who had retired or were about to retire and who had planned their retirements in reliance on their entitlement, under pre-1977 law, to spousal benefits unreduced by government pension benefits, Congress exempted from the pension offset requirement those spouses who were eligible to receive pension benefits prior to December 1982 and who would have qualified for unreduced spousal benefits under the Act as administered in January 1977. Congress also included a severability clause, which, in substance, provides that if the exception to the pension offset requirement is held invalid, that requirement would not be affected, and the application of the exception would not be broadened to include persons not included within it. Appellee husband (hereafter appellee), after retiring from the United States Postal Service, applied for husband's benefits under the Act on account of his wife, who had retired earlier and was fully insured under the Act. It was determined administratively that although appellee was entitled to spousal benefits, they were entirely offset by his Postal Service pension pursuant to the pension offset provision of the Act. Appellee and his wife then brought a class action in Federal District Court, alleging that application of the pension offset provision to him and other nondependent men but not to similarly situated nondependent women violated the Due Process Clause of the Fifth Amendment, and that the severability clause was also unconstitutional.

The District Court held both the pension offset provision and the severability clause unconstitutional, concluding that the latter would, if valid, deprive appellee of standing to bring the action by preventing him from receiving any more spousal benefits if he prevails than he is now allowed.

Held:

1. Appellee has standing to prosecute this action. Because the right he asserts is the right to receive benefits according to classifications that do not without sufficient justification differentiate among covered applicants solely on the basis of sex, and not a substantive right to any particular amount of benefits, appellee's standing does not depend on his ability to obtain increased Social Security payments. The right to equal treatment guaranteed by the Constitution is not coextensive with any substantive rights to the benefits denied the party discriminated against. Rather, discrimination itself, by perpetuating "archaic and stereotypic notions" or by stigmatizing members of the disfavored group as "innately inferior" and therefore less worthy participants in the political community, can cause serious noneconomic injuries to those persons who are denied equal treatment solely because of their membership in a disfavored group. Because the severability clause would forbid only the extension of benefits to the excluded class and not the withdrawal of benefits from the favored class, the injury caused by the unequal treatment allegedly suffered by appellee may be redressed. Pp. 737–740.

2. The pension offset exception applies to otherwise eligible men only when they can show dependency on their wives for one-half of their support. The language and history of the exception plainly demonstrate that Congress intended to resurrect, for a 5-year grace period, the gender-based dependency test of pre-*Goldfarb* law so as to afford protection to those who anticipated receiving spousal benefits prior to *Goldfarb* without providing it also to those who would qualify only as a result of the *Goldfarb* decision. To interpret the exception, as appellee urges, so that it does not incorporate a gender-based classification of the kind invalidated in *Goldfarb* but instead exempts from the offset requirement both men and women, without regard to dependency, would defeat Congress' intention and, by rendering the offset requirement applicable to only a few applicants, frustrate the congressional aim of preventing a fiscal drain on the Social Security trust fund. Pp. 741–744.

3. The gender-based classification of the pension offset exception is constitutional. Pp. 744–751.

(a) Although temporarily reviving the gender-based classification invalidated in *Goldfarb*, the offset exception is directly and substantially related to the important governmental objective of protecting individuals who planned their retirements in reasonable reliance on the law in effect prior to that decision under which they could receive spousal benefits unreduced by the amount of government pensions to which they were also entitled. This objective provides an exceedingly persuasive justification for the gender-based classification incorporated in the offset exception. Pp. 745–748.

(b) And the means employed by the statute is substantially related to the achievement of that objective. By reviving for a 5-year period the eligibility criteria in effect in January 1977, the offset exception is narrowly tailored to protect only those persons who made retirement plans prior to the changes in the law that occurred after that date. Such persons, men as well as women, may receive spousal benefits unreduced by their government pensions while those persons, men as well as women, who first became eligible for benefits after January 1977 may not. The exception distinguishes Social Security applicants, not according to archaic generalizations about the roles and abilities of men and women, but rather according to whether they planned their retirements with the expectation, created by the law in effect in January 1977, that they would receive full spousal benefits and a government pension. Pp. 748–750.

Reversed.

BRENNAN, J., delivered the opinion for a unanimous Court.

Mark I. Levy argued the cause for appellant. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General McGrath*, and *Deputy Solicitor General Geller*.

John R. Benn argued the cause for appellees. With him on the brief were *Robert W. Bunch* and *Bruce K. Miller*.*

JUSTICE BRENNAN delivered the opinion of the Court.

Califano v. *Goldfarb*, 430 U. S. 199 (1977), held that a gender-based classification in the spousal-benefit provisions of the Social Security Act violated the right to the equal protection of the laws guaranteed by the Due Process Clause

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**Isabelle Katz Pinzler*, *Burt Neuborne*, and *Nancy Duff Campbell* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

Edith U. Fierst, *Joseph F. Henderson*, and *James R. Rosa* filed a brief for the American Federation of Government Employees et al. as *amici curiae*.

of the Fifth Amendment. In this case, the United States District Court for the Northern District of Alabama held that amendments to the Act, adopted in 1977 partly in response to our decision, unjustifiably revive the gender-based classification that was invalidated in *Goldfarb* and therefore also violate the Fifth Amendment. App. to Juris. Statement 1a–9a. The Secretary of Health and Human Services appealed directly to this Court. We noted probable jurisdiction under 28 U. S. C. § 1252, 460 U. S. 1036 (1983), and now reverse.

I

A

The Social Security Act (Act) provides spousal benefits for the wives, husbands, widows, and widowers of retired and disabled wage earners. 42 U. S. C. § 402 (1976 ed. and Supp. V). Prior to December 1977, benefits were payable only to those husbands or widowers who could demonstrate dependency on their wage-earning wives for one-half of their support. Wives and widows, on the other hand, were entitled to spousal benefits without any such showing of dependency on their husbands. See former 42 U. S. C. §§ 402(b), (c)(1)(C), and (f)(1)(D). In March 1977, *Califano* v. *Goldfarb, supra,* affirmed the judgment of a three-judge District Court which held that the gender-based dependency requirement for widowers violated the equal protection component of the Due Process Clause of the Fifth Amendment.[1] Subsequently, the Court summarily affirmed two District Court decisions invalidating the dependency requirement for husbands' benefits. *Califano* v. *Silbowitz,* 430 U. S. 924 (1977); *Jablon* v. *Califano,* 430 U. S. 924 (1977).

Following these decisions, as part of a general reform of the Social Security system, Congress repealed the dependency requirement for widowers and husbands. Social Security

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[1] There was no majority opinion in *Goldfarb.* See 430 U. S., at 201 (plurality opinion); *id.,* at 217 (STEVENS, J., concurring in judgment).

Amendments of 1977 (1977 Amendments), §§334(b)(1), (d)(1), Pub. L. 95–216, 91 Stat. 1544, 1545, 42 U. S. C. §§402(c)(1), (f)(1) (1976 ed., Supp. V). See S. Rep. No. 95–572, pp. 88, 93 (1977).[2] It concluded, however, that elimination of the dependency test, by increasing the number of individuals entitled to spousal benefits, could create a serious fiscal problem for the Social Security trust fund. See *id.*, at 27–28. This problem was particularly acute with respect to the large number of retired federal and state employees who would now become eligible for spousal benefits. Unlike most applicants, who must offset any dual Social Security benefits against each other, 42 U. S. C. §402(k)(3)(A), retired civil servants could, at the time of the 1977 Amendments, receive the full amount of both the spousal benefits and the government pensions to which they were entitled. Congress estimated that payment of unreduced spousal benefits to such individuals could cost the system an estimated $190 million in 1979. S. Rep. No. 95–572, *supra*, at 27–28.

To avoid this fiscal drain, Congress included as part of the 1977 Amendments a "pension offset" provision that generally requires the reduction of spousal benefits by the amount of certain Federal or State Government pensions received by the Social Security applicant. 1977 Amendments, §§334(a)(2) and (b)(2), 42 U. S. C. §§402(b)(4)(A) and (c)(2)(A) (1976 ed., Supp. V). Congress estimated that 90 percent of the savings that would be achieved by the pension offset provision as proposed by the Senate would be attributable to a reduction in payments to nondependent husbands and widowers who had not been entitled to any spousal benefits prior to the decision in *Goldfarb*. See S. Rep. No. 95–572, *supra*, at 81. The remaining portion of the savings, however, would come from a reduction in benefits to individuals, mostly women but also dependent men, who had retired or were about to retire and who had planned their retirements in reliance on their entitlement, under pre-1977 law, to spousal benefits unreduced by government pension benefits. See *ibid.;* H. R. Conf. Rep. No. 95–837, p. 72 (1977); S. Conf. Rep. No. 95–612, p. 72 (1977). In order to protect the reliance interests of this group, see *infra*, at 742, Congress exempted from the pension offset requirement as ultimately enacted those spouses who were eligible to receive pension benefits prior to December 1982 and who would have qualified for unreduced spousal benefits under the Act "as it was in effect and being administered in January 1977." 1977 Amendments, § 334(g)(1), note following 42 U. S. C. § 402 (1976 ed., Supp. V).[3]

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[2] At the same time, Congress directed the Department of Health, Education, and Welfare to include "the entire question of such gender-based distinctions . . . in [a] 6-month study of proposals to eliminate dependency and sex discrimination . . . ." H. R. Conf. Rep. No. 95–837, p. 73 (1977). Thereafter, other gender-based distinctions were eliminated from the Act by the Social Security Amendments of 1983, Pub. L. 98–21, §§301–309, 97 Stat. 109–115; see H. R. Conf. Rep. No. 98–47, p. 140 (1983).

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[3] Section 334(g) of the 1977 Amendments, Pub. L. 95–216, 91 Stat. 1546, note following 42 U. S. C. § 402 (1976 ed., Supp. V), provides in full:

"(1) The amendments made by the preceding provisions of this section [section 334] shall not apply with respect to any monthly insurance benefit payable, under subsection (b), (c), (e), (f), or (g) (as the case may be) of section 202 of the Social Security Act, to an individual —

"(A) to whom there is payable for any month within the 60-month period beginning with the month in which this Act is enacted (or who is eligible in any such month for) a monthly periodic benefit (within the meaning of such provisions) based upon such individual's earnings while in the service of the Federal Government or any State or political subdivision thereof, as defined in section 218(b)(2) of the Social Security Act); and

"(B) who at time of application for or initial entitlement to such monthly insurance benefit under such subsection (b), (c), (e), (f), or (g) meets the requirements of that subsection as it was in effect and being administered in January 1977.

"(2) For purposes of paragraph (1)(A), an individual is eligible for monthly periodic benefit for any month if such benefit would be payable to such individual for that month if such individual were not employed during that month and had made proper application for such benefit.

"(3) If any provision of this subsection, or the application thereof to any person or circumstance, is held invalid, the remainder of this section shall

In the same subsection in which it established this 5-year grace period for individuals who qualified for spousal benefits in January 1977, Congress also included a severability clause, which provides:

> "If any provision of this subsection, or the application thereof to any person or circumstance, is held invalid, the remainder of this section shall not be affected thereby, but the application of this subsection to any other persons or circumstances shall also be considered invalid." 1977 Amendments, § 334(g)(3), note following 42 U. S. C. § 402 (1976 ed., Supp. V).

The Conference Committee explained that the severability clause was enacted "so that if [the exception to the pension offset provision] is found invalid the pension-offset . . . would not be affected, and the application of the exception clause would not be broadened to include persons or circumstances that are not included within it." H. R. Conf. Rep. No. 95-837, pp. 71–72 (1977); S. Conf. Rep. No. 95–612, pp. 71–72 (1977).

B

Appellee Robert H. Mathews (hereafter Mathews or appellee) retired from his job with the United States Postal Service on November 18, 1977. His wife, who had retired from her job a few months earlier, was fully insured under the

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not be affected thereby, but the application of this subsection to any other persons or circumstances shall also be considered invalid."

On January 12, 1983, Congress created an exception from the pension offset provision for any person eligible for a pension prior to July 1983 who satisfies a half-support dependency test. Pub. L. 97–455, § 7, 96 Stat. 2501. On April 20, 1983, Congress revised the pension offset provision, which is now applicable to all persons, without exception, who become eligible to retire in or after July 1983 and which requires the offsetting of only two-thirds of the public pension. Pub. L. 98–21, § 337, 97 Stat. 131. The exception to the offset provision at issue in this case still applies to nondependent women eligible for pensions prior to December 1982 but not to such nondependent men as the named plaintiff in this action. Accordingly, the recent amendments to the Act do not moot this case.

Social Security Act. In December 1977, Mathews applied for husband's benefits on his wife's account. On review of the application, the Social Security Administration (SSA) informed Mathews that he was entitled to spousal benefits of $153.30 per month but that, because, as appellee acknowledged, he was not dependent upon his wife for one-half of his support, this amount would be entirely offset by his $573 per month Postal Service pension in accordance with § 334(b)(2) of the 1977 Amendments, 42 U. S. C. § 402(c)(2) (1976 ed., Supp. V). App. to Juris. Statement 2a. After a hearing, an Administrative Law Judge (ALJ) affirmed the SSA's initial decision. *Id.*, at 16a–22a. The ALJ's decision was in turn affirmed by the Appeals Council of the Department of Health and Human Services and thereby became the final decision of the Secretary. *Id.*, at 13a–14a.

Mathews and his wife then brought this class action against the Secretary in the United States District Court for the Northern District of Alabama under § 205(g) of the Act, 42 U. S. C. 405(g). The complaint alleged that application of the pension offset provision of the 1977 Amendments to Mathews and other nondependent men but not to similarly situated nondependent women violated the Due Process Clause of the Fifth Amendment and sought a declaratory judgment to that effect. Appellee also contended that the severability clause of the 1977 Amendments was unconstitutional. The District Court certified a nationwide class composed of "all applicants for husband's insurance benefits . . . whose applications . . . have been denied [beginning 60 days before the filing of the complaint] solely because of the statutory requirement that husbands must have received more than one-half of their support from their wives in order to be entitled to benefits." App. to Juris. Statement 10a.

Shortly thereafter, the District Court filed an opinion, *id.*, at 1a–9a, and order, *id.*, at 27a–28a, holding both the pension offset exception of § 334(g)(1)(B) and the severability clause of § 334(g)(3) unconstitutional. The court noted that, in essence, the exception to the pension offset "provides a five-year grace period for all women who retire within five years of the enactment, and for men who retire within five years of the enactment and who are economically dependent upon their wives." *Id.*, at 3a. In light of this gender-based classification, the court noted that the offset exception could be upheld only if it "'serve[s] important governmental objectives and [is] substantially related to achievement of those objectives.'" *Id.*, at 4a, quoting *Craig* v. *Boren*, 429 U. S. 190, 197 (1976). The court decided that the exception could not be justified as protecting the reliance interests of individuals who had planned their retirements prior to the 1977 Amendments in expectation of undiminished benefits because, by requiring men to prove dependency notwithstanding the decision in *Goldfarb*, the offset exception presumes that "women would have relied upon the practices of the Social Security Administration, yet men would not have relied upon a decision of the Supreme Court." App. to Juris. Statement 5a. Accordingly, the court held that the "portion of the exception to the pension offset provision that requires a male applicant to prove that he received one-half of his economic support from his wife violates the equal protection guarantees of the due process clause of the fifth amendment." *Id.*, at 6a–7a (footnote omitted).

Having invalidated the exception to the offset provision, the District Court considered the severability clause of § 334(g)(3). The court noted that, in the event appellee obtained a judgment that the offset exception unconstitutionally discriminates against him, the clause, if valid, would require nullification of the exception as to all persons, rather than extension of the exception to persons like appellee. Consequently, all government retirees not covered by Social Security, without regard to gender or dependency, would have their spousal benefits offset by the amount of their government pensions. The court characterized this effect of the severability clause as an effort by Congress "to mandate the outcome of any challenge to the validity of the [pension offset] exception by making such a challenge fruitless. Even if a plaintiff achieved success in having the gender-based classification stricken, he would derive no personal benefit from the decision, because the pension offset would be applied to all applicants without exception." *Id.*, at 8a. Because of its view that Congress could not have meant to defeat the reliance interests of government retirees in that way, the court concluded "that the severability clause is not an expression of the true Congressional intent, but instead is an adroit attempt to discourage the bringing of an action by destroying standing." *Ibid.* Accordingly, the court held the severability provision unconstitutional and ordered the Secretary to pay Mathews and the rest of the plaintiff class full spousal benefits without regard to dependency and without offsetting the amount of their government pensions. *Id.*, at 9a.

II

Because it may affect our jurisdiction, see *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 616 (1973), we consider first the District Court's conclusion that the severability provision of the 1977 Amendments would, if valid, deprive appellee of standing to bring this action by preventing him from receiving any more spousal benefits if he prevails than he is now allowed. Appellee agrees with the District Court's analysis and, for that reason, contends that the severability clause amounts to an unconstitutional attempt by Congress to thwart the jurisdiction and remedial power of the federal courts. We agree with the Secretary, however, that because the right asserted by appellee is the right to receive "benefits . . . distributed according to classifications which do not without sufficient justification differentiate among covered [applicants] solely on the basis of sex," *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 647 (1975), and not a substantive right to any particular amount of benefits, appellee's standing does not depend on his ability to obtain increased Social Security payments.

In order to establish standing for purposes of the constitutional "case or controvery" requirement, a plaintiff "must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 99 (1979), and that the injury "is likely to be redressed by a favorable decision," *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U. S. 26, 38 (1976). In this case, appellee claims a type of personal injury we have long recognized as judicially cognizable.[4] He alleges that the pension offset exception subjects him to unequal treatment in the provision of his Social Security benefits solely because of his gender; specifically, as a nondependent man, he receives fewer benefits than he would if he were a similarly situated woman. App. 6.

Although the severability clause would prevent a court from redressing this inequality by increasing the benefits payable to appellee, we have never suggested that the injuries caused by a constitutionally underinclusive scheme can be remedied only by extending the program's benefits to the excluded class. To the contrary, we have noted that a court sustaining such a claim faces "two remedial alternatives: [it] may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion." *Welsh* v. *United States*, 398 U. S. 333, 361 (1970) (Harlan, J., concurring in result). See *Califano* v. *Westcott*, 443 U. S. 76,

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[4] *E. g.*, *Wengler* v. *Druggists Mutual Insurance Co.*, 446 U. S. 142, 147–149 (1980); *Califano* v. *Goldfarb*, 430 U. S. 199, 212 (1977) (plurality opinion). See *Baker* v. *Carr*, 369 U. S. 186, 207 (1962) (finding standing in case in which "[t]he injury which appellants assert is that this classification disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality *vis-à-vis* voters in irrationally favored counties"). See also *Linda R. S.* v. *Richard D.*, 410 U. S. 614, 620–621 (1973) (WHITE, J., dissenting).

89–91 (1979).[5] For that reason, we have frequently entertained attacks on discriminatory statutes or practices even when the government could deprive a successful plaintiff of any monetary relief by withdrawing the statute's benefits from both the favored and the excluded class.[6]

These decisions demonstrate that, like the right to procedural due process, see *Carey* v. *Piphus*, 435 U. S. 247, 266 (1978), the right to equal treatment guaranteed by the Constitution is not coextensive with any substantive rights to the benefits denied the party discriminated against. Rather, as we have repeatedly emphasized, discrimination itself, by perpetuating "archaic and stereotypic notions" or by stigmatizing members of the disfavored group as "innately inferior" and therefore as less worthy participants in the political community, *Mississippi University for Women* v. *Hogan*, 458 U. S. 718, 725 (1982), can cause serious noneconomic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group.[7] Accordingly, as Justice Brandeis explained, when the "right invoked is that to equal treatment," the appropriate remedy is a *mandate* of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class. *Iowa-Des Moines National Bank* v. *Bennett*, 284 U. S. 239, 247 (1931).[8] Because the severability clause would forbid only the latter and not the former kind of relief in this case, the injury caused by the unequal treatment allegedly suffered by appellee may "be redressed by a favorable decision," *Simon* v. *Eastern Kentucky Welfare Rights Organization*, *supra*, at 38, and he therefore has standing to prosecute this action.[9]

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[5] Although the choice between "extension" and "nullification" is within the "constitutional competence of a federal district court," *Califano* v. *Westcott*, 443 U. S., at 91, and ordinarily "extension, rather than nullification, is the proper course," *id.*, at 89, the court should not, of course, "use its remedial powers to circumvent the intent of the legislature," *id.*, at 94 (opinion of POWELL, J.), and should therefore "measure the intensity of commitment to the residual policy and consider the degree of potential disruption of the statutory scheme that would occur by extension as opposed to abrogation." *Welsh* v. *United States*, 398 U. S., at 365 (Harlan, J., concurring in result). See also *Califano* v. *Westcott*, *supra*, at 90. In this case, Congress has, through the severability clause, clearly expressed its preference for nullification, rather than extension, of the pension offset exception in the event it is found invalid. Because we conclude that the severability clause does not deprive appellee of standing to seek judicial redress for the alleged discrimination of the offset exception, we need not consider his claim that a legislative attempt to thwart a court's ability to remedy a constitutional violation would itself violate the Constitution. See Brief for Appellees 40–55.

[6] *E. g.*, *Wengler* v. *Druggists Mutual Insurance Co.*, *supra*, at 152–153; *Orr* v. *Orr*, 440 U. S. 268, 272 (1979); *Califano* v. *Webster*, 430 U. S. 313, 316 (1977); *Kahn* v. *Shevin*, 416 U. S. 351, 352 (1974); *Stanton* v. *Stanton*, 421 U. S. 7, 17–18 (1975).

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[7] See, *e. g.*, *Bob Jones University* v. *United States*, 461 U. S. 574, 593–595 (1983); *Havens Realty Corp.* v. *Coleman*, 455 U. S. 363, 373–374 (1982); *Gladstone, Realtors* v. *Village of Bellwood*, 441 U. S. 91, 109–114 (1979); *Norwood* v. *Harrison*, 413 U. S. 455, 465–466, 467 (1973); *Frontiero* v. *Richardson*, 411 U. S. 677, 684–685 (1973) (plurality opinion); *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U. S. 205, 208 (1972); *id.*, at 212 (WHITE, J., concurring); *Brown* v. *Board of Education*, 347 U. S. 483, 493 (1954). See also *Sierra Club* v. *Morton*, 405 U. S. 727, 734–735 (1972).

[8] Consistent with Justice Brandeis' explanation of the appropriate relief for a denial of equal treatment, we have often recognized that the victims of a discriminatory government program may be remedied by an end to preferential treatment for others. *E. g.*, *Gilmore* v. *City of Montgomery*, 417 U. S. 556, 566–567 (1974); *Norwood* v. *Harrison*, *supra*, at 470–471; *Griffin* v. *School Board of Prince Edward County*, 377 U. S. 218, 232–234 (1964). See also *Califano* v. *Westcott*, *supra*, at 93–94 (opinion of POWELL, J.) (finding federal aid program violative of plaintiffs' right to equal protection but arguing that appropriate remedy under statute was to enjoin further payment of benefits to all applicants, including plaintiffs).

[9] The relationship between the right asserted by appellee and the injury allegedly caused by the denial of that right distinguishes this case from *Simon* v. *Eastern Kentucky Welfare Rights Organization*. In that case, the Court concluded that indigents, who contended that they were denied medical treatment by tax-exempt hospitals, lacked standing to challenge the Government's allegedly unlawful administration of the Tax Code because it was "purely speculative" whether their injury was caused by the

III

Although appellee prevailed in the District Court on his constitutional claim, he urges as an alternative ground for affirmance that we construe the pension offset exception so that it does not incorporate a gender-based classification of the kind invalidated in *Califano* v. *Goldfarb*, 430 U. S. 199 (1977), but instead exempts from the offset requirement both men and women, without regard to dependency. Relying on "the maxim that statutes should be construed to avoid constitutional questions," *United States* v. *Batchelder*, 442 U. S. 114, 122 (1979), he contends that Congress, in reviving the qualifying criteria in effect before the decision in *Goldfarb*, must be presumed to have done so without reenacting the gender-based dependency test which this Court had held unconstitutional.

The canon favoring constructions of statutes to avoid constitutional questions does not, however, license a court to usurp the policymaking and legislative functions of duly elected representatives. *Yu Cong Eng* v. *Trinidad*, 271 U. S. 500, 518 (1926). See *NLRB* v. *Catholic Bishop of Chicago*, 440 U. S. 490, 499–501 (1979); *id.*, at 508–511 (BRENNAN, J., dissenting); *United States* v. *Sullivan*, 332 U. S. 689, 693 (1948). "'[A]lthough this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of

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Government's actions or was instead attributable to "decisions made by the hospitals without regard to the tax implications." 426 U. S., at 42–43. Here, in contrast, there can be no doubt about the direct causal relationship between the Government's alleged deprivation of appellee's right to equal protection and the personal injury appellee has suffered—denial of Social Security benefits solely on the basis of his gender. Similarly, because appellee personally has been denied benefits that similarly situated women receive, his is not a generalized "claim of 'the right possessed by every citizen, to require that the Government be administered according to law . . . .'" *Baker* v. *Carr*, 369 U. S., at 208, quoting *Fairchild* v. *Hughes*, 258 U. S. 126, 129 (1922).

perverting the purpose of a statute . . .' or judicially rewriting it." *Aptheker* v. *Secretary of State*, 378 U. S. 500, 515 (1964), quoting *Scales* v. *United States*, 367 U. S. 203, 211 (1961). In this case, the language and history of the offset exception plainly demonstrate that Congress meant to resurrect, for a 5-year grace period, the gender-based dependency test of pre-*Goldfarb* law.

As we have noted, *supra*, at 731–733, Congress adopted the pension offset requirement to prevent the serious fiscal drain that it concluded would result from payment of unreduced benefits to the new class of recipients made eligible by the decision in *Goldfarb*. Nevertheless, in an effort to protect the reliance interests of individuals who had planned their retirement before the March 1977 *Goldfarb* decision and the resulting amendments to the Act, see H. R. Conf. Rep. No. 95–837, p. 72 (1977); S. Conf. Rep. No. 95–612, p. 72 (1977), Congress exempted from the offset requirement those individuals eligible for spousal benefits under the Act "as it was in effect and being administered in January 1977." There can be no dispute that in January 1977 men were eligible for benefits only upon a showing of dependency whereas women were subject to no such requirement. See former 42 U. S. C. §§402(c) and (f); *Califano* v. *Goldfarb*, *supra*, at 201–202, and nn. 1, 2.[10] And Congress further indicated its intent to revive those eligibility criteria by including an unusual severability clause that would, in the event the classification were held invalid, sacrifice the exception's protection of reliance interests to the goal served by the offset provision itself—preventing an undue financial burden on the system. See *supra*, at 734, and n. 5; H. R. Conf. Rep. No. 95–837, *supra*, at 72; S. Conf. Rep. No. 95–612, *supra*, at 72.

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[10] This conclusion, contrary to appellee's suggestion, is not altered by the fact that in January 1977 the SSA was withholding disputed benefit claims pending this Court's disposition of *Goldfarb*. The Social Security Claims Manual in effect at the time notes: "The current law requires that claimants for (widower's) (husband's) benefits meet a one-half support requirement. [While that requirement has been challenged in court], the law remains unchanged and no payment can be made until a final decision has been rendered on the constitutionality of the one-half support requirement." Social Security Administration Claims Manual Transmittal No. 3844 (July 14, 1976). Thus, the Manual indicates that, as provided by the extant provisions of the Act, the SSA did not in January 1977 pay benefits to male claimaints who failed to demonstrate dependency on their wives.

Consistent with the plain import of these provisions, Senator Long, then Chairman of the Senate Finance Committee and principal manager of the bill in the Senate, explained that the exception clause was meant "to afford . . . protection to those who anticipated receiving their spouses benefits prior to March 1977 *without providing it also to those [who] would qualify only as a result of [the Goldfarb] decision.*" 123 Cong. Rec. 39134 (1977) (emphasis added). See also *id.*, at 39008 (remarks of Rep. Ullman). Appellee's proposed interpretation of the exception provision would defeat this clearly expressed intention and, by rendering the offset requirement applicable to very few applicants,[11] frustrate the congressional aim of preventing a major fiscal drain on the Social Security trust fund. Accordingly, we reject appellee's construction of the Act and conclude that the exception to the offset provision applies to otherwise eligible men only when they can show dependency on their wives for one-half of their support. We turn therefore to consider the constitutionality of that gender-based classification.

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[11] The only individuals identified by appellee who would be subject to the offset requirement under his interpretation of the Act are those who first became eligible for spousal benefits after enactment of the statute in December 1977. See Brief for Appellees 23–24; Reply Brief for Appellant 4, 5, n. 2. For example, the 1977 Amendments shortened the number of years a divorced wife must be married before being eligible for spousal benefits, effective December 1978, Pub. L. 95–216, § 337, 91 Stat. 1548, 42 U. S. C. §§ 402(b)(1)(G), 416(d) (1976 ed., Supp. V), and a number of judicial decisions just prior and subsequent to the Amendments extended eligibility for benefits to new categories of individuals, see, *e. g.*, *Cooper* v. *Harris*, 87 F. R. D. 107 (ED Pa. 1980) (young husbands); *Mertz* v. *Harris*, 497 F. Supp. 1134 (SD Tex. 1980) (remarried widowers); *Yates* v. *Califano*, 471 F. Supp. 84 (WD Ky. 1979) (surviving divorced fathers); *Oliver* v. *Califano*, [1977–1978 Transfer Binder] CCH Unempl. Ins. Rep. ¶ 15244 (ND Cal. 1977) (divorced husbands). These groups were not, however, mentioned in the legislative history of the offset and exception provisions, and limiting the offset to such newly eligible beneficiaries would frustrate Congress' express desire to prevent the financial burden to the system of extending unreduced benefits to those nondependent men first made eligible by the *Goldfarb* decision. See S. Rep. No. 95–572, pp. 27–28 (1977).

IV

We recently reviewed the "firmly established principles" by which to evaluate a claim of gender discrimination like that made by appellee:

> "Our decisions . . . establish that the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification' for the classification. . . . The burden is met only by showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.' . . .
>
> "Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions. Thus, if the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate. . . .
>
> "If the State's objective is legitimate and important, we next determine whether the requisite direct, substantial relationship between objective and means is present." *Mississippi University for Women* v. *Hogan*, 458 U. S., at 724–725. (Citations and footnotes omitted.)

We therefore consider in turn whether the Secretary has carried her burden of (A) showing a legitimate and "exceedingly persuasive justification" for the gender-based classification of the pension offset provision and (B) demonstrating "the requisite direct, substantial relationship" between the classification and the important governmental objectives it purports to serve.

A

Although the offset exception temporarily revives the gender-based eligibility requirements invalidated in *Goldfarb*, Congress' purpose in adopting the exception bears no relationship to the concerns that animated the original enactment of those criteria. The Court concluded in *Goldfarb* that the original gender-based standards, which were premised on an assumption that females would normally be dependent on the earnings of their spouses but males would not, constituted an "accidental byproduct of a traditional way of thinking about females," 430 U. S., at 223 (STEVENS, J., concurring in judgment), that reflected "'old notions' and 'archaic and overbroad' generalizations" about the roles and relative abilities of men and women, *id.*, at 211, 217 (plurality opinion). Accordingly, the statute's "objective itself [was] illegitimate." *Mississippi University for Women* v. *Hogan*, *supra*, at 725.[12]

The provision at issue here, in contrast, reflects no such illegitimate government purposes. As detailed above, Congress adopted the offset exception in order to protect the expectations of persons, both men and women, who had planned their retirements based on pre-January 1977 law, under which they could receive spousal benefits unreduced by the amount of any government pensions to which they were also entitled. Congress accomplished its aim by incorporating the eligibility criteria as they existed in January 1977; its choice of this approach rather than an explicit adoption of new gender-based standards confirms that its purpose was to protect reliance on prior law, not to reassert the sexist assumptions rejected in *Goldfarb*.

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[12] See also *Wengler* v. *Druggists Mutual Insurance Co.*, 446 U. S., at 147–149; *Weinberger* v. *Wiesenfeld*, 420 U. S. 636, 643 (1975); *Schlesinger* v. *Ballard*, 419 U. S. 498, 507 (1975); *Frontiero* v. *Richardson*, 411 U. S., at 688.

Nor is that purpose rendered illegitimate by the fact that it is achieved through a temporary revival of an invalidated classification. We have recognized, in a number of contexts, the legitimacy of protecting reasonable reliance on prior law even when that requires allowing an unconstitutional statute to remain in effect for a limited period of time. See, *e. g.*, *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U. S. 50, 87–89 (1982) (plurality opinion); *Buckley* v. *Valeo*, 424 U. S. 1, 142–143 (1976) *(per curiam); Chevron Oil Co.* v. *Huson*, 404 U. S. 97, 106–107 (1971). See also *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U. S. 702, 718–723 (1978). Although an unconstitutional scheme could not be retained for an unduly prolonged period in the name of protecting reliance interests, or even for a brief period if the expectations sought to be protected were themselves unreasonable or illegitimate, there is no indication that the offset exception suffers from either of these flaws. The duration of the exception is closely related to its goal of protecting only individuals who had planned their retirements in reliance on prior law, see *infra*, at 748–749, and appellee does not suggest that the expectations of those individuals, who hardly could have anticipated the adoption of the offset requirement, were unreasonable or illegitimate.

The protection of reasonable reliance interests is not only a legitimate governmental objective: it provides "an exceedingly persuasive justification" for the statute at issue here. See *Kirchberg* v. *Feenstra*, 450 U. S. 455, 461 (1981); *Personnel Administrator of Mass.* v. *Feeney*, 442 U. S. 256, 273 (1979). Appellee does not, and cannot, contest the Secretary's statement that "it is a significant and salutary goal to secure the retirement plans of our Nation's workers who in good faith had long and reasonably relied on the provisions of the Social Security Act." Brief for Appellant 33. Instead, appellee contends that the only people who could justifiably have relied on an expectation of unreduced benefits are those who actually retired before the effective date of the offset provision and those individuals will not be required to offset their benefits. Brief for Appellees 28–29, and n. 21, 31–32. Congress determined, however, that many individuals adjusted their spending and savings habits prior to their retirements in expectation of receiving full spousal benefits as well as a government pension,[13] and we have no reason to doubt that conclusion. One commentator has explained:

> "Many couples have undoubtedly made retirement plans and adjusted the level of their private saving and investment in anticipation of retirement benefits from social security which include a special benefit for a spouse. An abrupt denial of benefits in these cases, even if the spouse who would have received them is shown to be not truly dependent on the other is clearly inequitable since the couple's savings and retirement plans would have

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[13] See H. R. Conf. Rep. No. 95–837, p. 72 (1977) ("The managers are concerned that there may be large numbers of women, especially widows in their late fifties, who are already drawing pensions, or would be eligible to draw them within 5 years of the date of enactment of this bill, based on their non-covered work and whose retirement income was planned for on the assumption of the availability of full wife's or widow's benefits under social security"); S. Conf. Rep. No. 95–612, p. 72 (1977) (same); Staff of Senate Committee on Finance, 95th Cong., 1st Sess., Summary of H. R. 9346, the Social Security Amendments of 1977 as Passed by the Congress (P. L. 95–216) 7 (Comm. Print 1977) ("To assure that persons who have been counting on these benefits for many years and who are now at or near retirement age will not be adversely affected, H. R. 9346 includes a transitional exception under which certain individuals will not have their social security benefits as spouses reduced by the amount of their public pension. This exception applies to those who . . . would qualify for spouses benefits under social security under the law as in effect and as administered in January 1977").

> been different had the spouse benefit not been anticipated. Thus, were it to be decided that wives should prove dependency in order to receive spouse benefits, a strong argument could be made for making such a change gradually so as to avoid inequities to couples approaching retirement who had anticipated that such benefits would be available to them and had made their retirement plans accordingly." M. Flowers, Women and Social Security: An Institutional Dilemma 41 (1977).

In short, particularly in the years immediately preceding retirement, individuals make spending, savings, and investment decisions based on assumptions regarding the amount of income they expect to receive after they stop working. For such individuals reliance on the law in effect during those years may be critically important.[14] In recognition of this fact, the offset exception, in the words of the Conference Report, protects "people who are already retired, or close to retirement, from public employment and who cannot be expected to readjust their retirement plans to take account of the 'offset' provision that will apply in the future." H. R. Conf. Rep. No. 95-837, p. 72 (1977); S. Conf. Rep. No. 95-612, p. 72 (1977). That purpose, consistent with the principle that "'[g]reat nations, like great men, should keep their word,'" *Astrup* v. *INS*, 402 U. S. 509, 514, n. 4 (1971), quoting *FPC* v. *Tuscarora Indian Nation*, 362 U. S. 99, 142 (1960) (Black, J., dissenting), provides an exceedingly persuasive justification for the gender-based classification incorporated in the offset exception.

B

Having identified the legitimate and important governmental purpose of the offset exception, we have little trouble concluding that the means employed by the statute is "substantially related to the achievement of [that] objectiv[e]." *Wengler* v. *Druggists Mutual Insurance Co.*, 446 U. S. 142, 150 (1980). By reviving for a 5-year period the eligibility criteria in effect in January 1977, the exception is narrowly tailored to protect only those individuals who made retirement plans prior to the changes in the law that occurred after that date. Individuals who were eligible for spousal benefits before the law changed and who retire within five years of the statute's enactment may reasonably be assumed to have begun planning for their retirement prior to the adoption of the offset provision. See *supra*, at 747–748. Such persons, men as well as women, may receive spousal benefits unreduced by their government pensions, while those persons, men as well as women, who first became eligible for benefits after January 1977 may not.[15]

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[14] Indeed, the Social Security Act itself recognizes the critical importance of protecting an individual's expectation of benefits even in circumstances where payment is contrary to *current* law. The Act forbids recovery of such overpayments when the recipient is not at fault and recapture "would be against equity and good conscience." 42 U. S. C. § 404(b).

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[15] The latter group includes persons who first became entitled to spousal benefits under the 1977 Amendments themselves as well as those whose eligibility was first established in judicial decisions issued from 1977 to the present. See n. 11, *supra*. Because the offset provision was enacted at the end of 1977, the only members of this group who, under the law in effect at any given time, might have expected to receive spousal benefits unreduced by their government pensions are those who became eligible during 1977 as a result of *Goldfarb* and other decisions announced that year. The Act protects the reliance interests of most such people, however, by providing that the offset applies only to applicants who file their claims for spousal benefits in or after December 1977, the month of enactment of the Amendments. 1977 Amendments § 334(f), Pub. L. 95–216, 91 Stat. 1546, note following 42 U. S. C. § 402 (1976 ed., Supp. V).

The reliance of appellee on the *Goldfarb* decision was frustrated not by operation of the exception provision but rather by the unfortunate timing of his retirement. After being informed that, as a result of the March 1977 *Goldfarb* decision, he would receive spousal benefits unreduced by his Government pension, Brief for Appellees 2, Mathews retired in October 1977 and filed his application for benefits on December 15. App. 4. If he had applied for benefits before December 1, he would have been exempt from the offset provision which, as noted, took effect that day. Alternatively, if he had not retired until after December 20, the day the 1977 Amendments were enacted, he would have known that he could not expect spousal bene-

Moreover, the offset exception was plainly adopted "through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women." *Mississippi University for Women* v. *Hogan*, 458 U. S., at 726 (footnote omitted). As the legislative history set out above demonstrates, Congress considered carefully and at length both the financial problems that led to the offset provision and the reliance interests that might be frustrated by that requirement. The solution finally adopted, after rejection of more expensive or impractical alternatives,[16] distinguishes Social Security applicants, not according to archaic generalizations about the roles and abilities of men and women, but rather according to whether they planned their retirements with the expectation, created by the law in effect in January 1977, that they would receive both full spousal benefits and a government pension.

V

The exception to the pension offset requirement set out in § 334(g)(1) of the 1977 Amendments to the Social Security Act, while temporarily reviving the gender-based classifica-

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fits unreduced by his Government pension and might therefore have altered his plans. Although the bind thus imposed on Mathews by the enactment and effective dates of the Amendments is regrettable, the statute is not rendered fatally underinclusive because it protects only expectations of substantially greater duration than his.

[16] See, *e. g.*, Staff of the House Committee on Ways and Means, 95th Cong., 1st Sess., WMCP: 95–57, Summary of the Principal Provisions of H. R. 9346, The Social Security Financing Amendments of 1977 As Passed By the House 4 (Comm. Print 1977) (House version proposing 6-month administration study of, *inter alia*, "various proposals to mitigate the cost impact of the recent *Goldfarb* decision on the system"); S. Rep. No. 95–572, p. 28 (1977) (describing consideration and rejection on grounds of potential abuse, inequity, invasion of privacy, and administrative difficulty of requirement that each applicant for spousal benefits prove dependency on spouse).

tion invalidated in *Califano* v. *Goldfarb*, is directly and substantially related to the important governmental interest of protecting individuals who planned their retirements in reasonable reliance on the law in effect prior to that decision. Accordingly, the judgment of the District Court is

Reversed.

MONSANTO CO. *v.* SPRAY-RITE SERVICE CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 82-914. Argued December 5, 1983—Decided March 20, 1984

From 1957 to 1968, respondent, a wholesale distributor of agricultural chemicals that engaged in a discount operation, sold agricultural herbicides manufactured by petitioner. In 1968, petitioner refused to renew respondent's 1-year distributorship term, and thereafter respondent was unable to purchase from other distributors as much of petitioner's products as it desired or as early in the season as it needed them. Respondent ultimately brought suit in Federal District Court under § 1 of the Sherman Act, alleging that petitioner and some of its distributors conspired to fix the resale prices of petitioner's products and that petitioner had terminated respondent's distributorship in furtherance of the conspiracy. Petitioner denied the allegations of conspiracy, and asserted that respondent's distributorship had been terminated because of its failure to hire trained salesmen and promote sales to dealers adequately. The District Court instructed the jury that petitioner's conduct was *per se* unlawful if it was in furtherance of a price-fixing conspiracy. In answers to special interrogatories, the jury found, *inter alia*, that the termination of respondent's distributorship was pursuant to a price-fixing conspiracy between petitioner and one or more of its distributors. The Court of Appeals affirmed, holding that there was sufficient evidence to satisfy respondent's burden of proving a conspiracy to set resale prices. It noted evidence of numerous complaints to petitioner from competing distributors about respondent's price-cutting practices. In substance, the court held that an antitrust plaintiff can survive a motion for a directed verdict if it shows that a manufacturer terminated a price-cutting distributor in response to or following complaints by other distributors.

Held:

1. The Court of Appeals applied an incorrect standard of proof to the evidence in this case. A basic distinction in any distributor-termination case is that between concerted action of the manufacturer and other distributors, which is proscribed by the Sherman Act, and independent action of the manufacturer, which is not proscribed. *United States* v. *Colgate & Co.*, 250 U. S. 300. A second important distinction in such cases is that between concerted action to set prices, which is *per se* illegal, and concerted action on nonprice restrictions, which is judged under

the rule of reason. See *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36. Permitting a price-fixing agreement to be inferred from the existence of complaints from other distributors, or even from the fact that termination came about "in response to" complaints, could deter or penalize perfectly legitimate conduct. Thus, something more than evidence of complaints is needed. The correct standard is that there must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently. That is, there must be direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective. Pp. 760–764.

2. Under the proper standard of proof, the evidence in this case created a jury issue as to whether respondent was terminated pursuant to a price-fixing conspiracy between petitioner and its distributors. Accordingly, the Court of Appeals' judgment is affirmed. Pp. 765–768.

(a) There was sufficient evidence for the jury reasonably to have concluded that petitioner and some of its distributors were parties to an "agreement" or "conspiracy" to maintain resale prices and terminate price-cutters. Pp. 765–766.

(b) It also would be reasonable to find that respondent's termination was part of or pursuant to that agreement, since it is necessary for competing distributors contemplating compliance with suggested prices to know that those who do not comply will be terminated. Moreover, there is some circumstantial evidence of such a link. Pp. 767–768.

684 F. 2d 1226, affirmed.

POWELL, J., delivered the opinion of the Court, in which all other Members joined, except WHITE, J., who took no part in the consideration or decision of the case. BRENNAN, J., filed a concurring opinion, *post*, p. 769.

Fred H. Bartlit, Jr., argued the cause for petitioner. With him on the briefs were *Jeffrey J. Kennedy*, *Marjorie Press Lindblom*, *Robert J. Kopecky*, *Michael T. Hannafan*, and *Richard W. Duesenberg*.

Assistant Attorney General Baxter argued the cause for the United States as *amicus curiae* in support of petitioner. With him on the brief were *Solicitor General Lee*, *Deputy Solicitor General Wallace*, *Deputy Assistant Attorney General Lipsky*, *Jerrold J. Ganzfried*, *Robert B. Nicholson*, and *Edward T. Hand*.

Edward L. Foote argued the cause for respondent. With him on the briefs were *Earl A. Jinkinson*, *Robert G. Foster*, and *David B. Love*.*

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*Briefs of *amici curiae* urging reversal were filed for Associates for Antitrust Analysis by *Wesley J. Liebeler;* for the National Agricultural Chemicals Association by *Donald F. Turner*, *Arnold M. Lerman*, *James S. Campbell*, and *Ronald J. Greene;* and for the National Association of Manufacturers by *Donald I. Baker*, *Robert H. Rawson, Jr.*, *Thomas E. Kauper*, *William E. Blasier*, and *Quentin Riegel.*

Briefs of *amici curiae* urging affirmance were filed for Burlington Coat Factory Warehouse Corp. by *Herbert S. Kassner;* for the National Mass Retailing Institute by *Endicott Peabody*, *Timothy J. Waters*, and *William D. Coston;* for the National Association of Catalog Showroom Merchandisers by *Richard B. Kelly;* for Service Merchandise Co., Inc., by *William A. Carey*, *John F. Sherlock III*, and *Donald F. Mintmire;* and for Forty-Six States by *Ken Eikenberry*, Attorney General of Washington, *John R. Ellis*, Deputy Attorney General, *Jon P. Ferguson* and *James Kirkham Johns*, Assistant Attorneys General, *Charles A. Graddick*, Attorney General of Alabama, *Susan Beth Farmer*, Assistant Attorney General, *Norman C. Gorsuch*, Attorney General of Alaska, *Louise E. Ma*, Assistant Attorney General, *Robert K. Corbin*, Attorney General of Arizona, *Alison B. Swan*, Assistant Attorney General, *John Steven Clark*, Attorney General of Arkansas, *David L. Williams*, Deputy Attorney General, *Jeffrey A. Bell*, Assistant Attorney General, *John K. Van de Kamp*, Attorney General of California, *Andrea Sheridan Ordin*, Chief Assistant Attorney General, *Sanford N. Gruskin*, Assistant Attorney General, *Wayne M. Liao*, Deputy Attorney General, *Duane Woodard*, Attorney General of Colorado, *Thomas P. McMahon*, Assistant Attorney General, *Joseph I. Lieberman*, Attorney General of Connecticut, *Robert M. Langer*, Assistant Attorney General, *Charles M. Oberly*, Attorney General of Delaware, *Vincent M. Amberly*, Deputy Attorney General, *Jim Smith*, Attorney General of Florida, *Bill L. Bryant, Jr.*, Assistant Attorney General, *Tany S. Hong*, Attorney General of Hawaii, *Sonia Faust*, Deputy Attorney General, *Neil F. Hartigan*, Attorney General of Illinois, *Thomas M. Genovese*, Assistant Attorney General, *Linley E. Pearson*, Attorney General of Indiana, *Frank A. Baldwin*, Deputy Attorney General, *Thomas J. Miller*, Attorney General of Iowa, *John R. Perkins*, Assistant Attorney General, *Robert T. Stephan*, Attorney General of Kansas, *Wayne E. Hundley*, Deputy Attorney General, *Steven L. Beshear*, Attorney General of Kentucky, *James M. Ringo*, Assistant Attorney General, *William J. Guste*, Attorney General of Louisiana, *John R. Flowers, Jr.*, Assistant Attorney General, *James E. Tierney*, Attorney General of Maine, *Stephen*

JUSTICE POWELL delivered the opinion of the Court.

This case presents a question as to the standard of proof required to find a vertical price-fixing conspiracy in violation of § 1 of the Sherman Act.

I

Petitioner Monsanto Co. manufactures chemical products, including agricultural herbicides. By the late 1960's, the

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L. Wessler, Assistant Attorney General, *Stephen H. Sachs*, Attorney General of Maryland, *Charles O. Monk II*, Assistant Attorney General, *Francis X. Bellotti*, Attorney General of Massachusetts, *Alan L. Kovacs*, Assistant Attorney General, *Frank J. Kelley*, Attorney General of Michigan, *Edwin M. Bladen*, Assistant Attorney General, *Hubert H. Humphrey III*, Attorney General of Minnesota, *Stephen P. Kilgriff*, Special Assistant Attorney General, *Bill Allain*, Attorney General of Mississippi, *Robert E. Sanders*, Special Assistant Attorney General, *Mike Greely*, Attorney General of Montana, *Pat Driscoll*, Chief Assistant Attorney General, *Paul L. Douglas*, Attorney General of Nebraska, *Dale A. Comer*, Assistant Attorney General, *Brian McKay*, Attorney General of Nevada, *William E. Isaeff*, Chief Deputy Attorney General, *Gregory H. Smith*, Attorney General of New Hampshire, *Irwin I. Kimmelman*, Attorney General of New Jersey, *Laurel A. Price*, *Paul Bardacke*, Attorney General of New Mexico, *Robert Abrams*, Attorney General of New York, *Lloyd Constantine*, Assistant Attorney General, *Rufus L. Edmisten*, Attorney General of North Carolina, *H. A. Cole, Jr.*, Special Deputy Attorney General, *John R. Corne*, Associate Attorney General, *Robert O. Wefald*, Attorney General of North Dakota, *Daniel Hobland*, Assistant Attorney General, *Michael C. Turpen*, Attorney General of Oklahoma, *James B. Franks*, Assistant Attorney General, *Dave Frohnmayer*, Attorney General of Oregon, *Richard L. Caswell*, Assistant Attorney General, *Leroy S. Zimmerman*, Attorney General of Pennsylvania, *Eugene F. Waye*, Deputy Attorney General, *Dennis J. Roberts*, Attorney General of Rhode Island, *Faith LaSalle*, Special Assistant Attorney General, *Mark V. Meierhenry*, Attorney General of South Dakota, *Dennis R. Holmes*, Assistant Attorney General, *William M. Leech, Jr.*, Attorney General of Tennessee, *William J. Haynes, Jr.*, Deputy Attorney General, *Jim Mattox*, Attorney General of Texas, *James V. Sylvester*, Assistant Attorney General, *David L. Wilkinson*, Attorney General of Utah, *Stephen G. Schwendiman*, Chief Assistant Attorney General, *Suzanne M. Dallimore*, Assistant Attorney General, *John J. Easton, Jr.*, Attorney General of Vermont, *Glenn R. Jarrett*, Assistant Attorney General, *Gerald L. Baliles*, Attorney Gentime at issue in this case, its sales accounted for approximately 15% of the corn herbicide market and 3% of the soybean herbicide market. In the corn herbicide market, the market leader commanded a 70% share. In the soybean herbicide market, two other competitors each had between 30% and 40% of the market. Respondent Spray-Rite Service Corp. was engaged in the wholesale distribution of agricultural chemicals from 1955 to 1972. Spray-Rite was essentially a family business, whose owner and president, Donald Yapp, was also its sole salaried salesman. Spray-Rite was a discount operation, buying in large quantities and selling at a low margin.

Spray-Rite was an authorized distributor of Monsanto herbicides from 1957 to 1968. In October 1967, Monsanto announced that it would appoint distributors for 1-year terms, and that it would renew distributorships according to several new criteria. Among the criteria were: (i) whether the distributor's primary activity was soliciting sales to retail dealers; (ii) whether the distributor employed trained salesmen capable of educating its customers on the technical aspects of Monsanto's herbicides; and (iii) whether the distributor could be expected "to exploit fully" the market in its geographical area of primary responsibility. Shortly thereafter, Monsanto also introduced a number of incentive programs,

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eral of Virginia, *Elizabeth B. Lacy*, Deputy Attorney General, *Craig T. Merritt*, Assistant Attorney General, *Chauncey H. Browning*, Attorney General of West Virginia, *Bronson C. La Follette*, Attorney General of Wisconsin, *Michael L. Zaleski*, Assistant Attorney General, *A. G. McClintock*, Attorney General of Wyoming, *Gay Vanderpoel*, Senior Assistant Attorney General, and *Judith W. Rogers*, Corporation Counsel for the District of Columbia.

Briefs of *amici curiae* were filed for the Association of General Merchandise Chains, Inc., by *James F. Rill*, *James M. Nicholson*, and *Edward T. Borda;* for the Beverly Hills Bar Association by *Eliot G. Disner;* for Dayton-Hudson Corp. by *John D. French* and *James T. Hale;* for the Small Business Legal Defense Committee by *Lawrence A. Sullivan;* and for Senator Howard M. Metzenbaum et al. by *Wesley J. Howard.*

such as making cash payments to distributors that sent salesmen to training classes, and providing free deliveries of products to customers within a distributor's area of primary responsibility.[1]

In October 1968, Monsanto declined to renew Spray-Rite's distributorship. At that time, Spray-Rite was the 10th largest out of approximately 100 distributors of Monsanto's primary corn herbicide. Ninety percent of Spray-Rite's sales volume was devoted to herbicide sales, and 16% of its sales were of Monsanto products. After Monsanto's termination, Spray-Rite continued as a herbicide dealer until 1972. It was able to purchase some of Monsanto's products from other distributors, but not as much as it desired or as early in the season as it needed. Monsanto introduced a new corn herbicide in 1969. By 1972, its share of the corn herbicide market had increased to approximately 28%. Its share of the soybean herbicide market had grown to approximately 19%.

Spray-Rite brought this action under § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1. It alleged that Monsanto and some of its distributors conspired to fix the resale prices of Monsanto herbicides. Its complaint further alleged that Monsanto terminated Spray-Rite's distributorship, adopted compensation programs and shipping policies, and encouraged distributors to boycott Spray-Rite in furtherance of this conspiracy. Monsanto denied the allegations of conspiracy, and asserted that Spray-Rite's distributorship had been terminated because of its failure to hire trained salesmen and promote sales to dealers adequately.

The case was tried to a jury. The District Court instructed the jury that Monsanto's conduct was *per se* unlawful if it was in furtherance of a conspiracy to fix prices. In answers to special interrogatories, the jury found that (i) the termination of Spray-Rite was pursuant to a conspiracy between Monsanto and one or more of its distributors to set resale prices, (ii) the compensation programs, areas of primary responsibility, and/or shipping policies were created by Monsanto pursuant to such a conspiracy, and (iii) Monsanto conspired with one or more distributors to limit Spray-Rite's access to Monsanto herbicides after 1968.[2] The jury awarded $3.5 million in damages, which was trebled to $10.5 million. Only the first of the jury's findings is before us today.[3]

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[1] These areas of primary responsibility were not exclusive territorial restrictions. Approximately 10 to 20 distributors were assigned to each area, and distributors were permitted to sell outside their assigned area.

The Court of Appeals for the Seventh Circuit affirmed. 684 F. 2d 1226 (1982). It held that there was sufficient evidence to satisfy Spray-Rite's burden of proving a conspiracy to set resale prices. The court stated that "proof of termination following competitor complaints is sufficient to support an inference of concerted action." *Id.*, at 1238.[4] Canvassing the testimony and exhibits that were before the jury, the court found evidence of numerous complaints from competing Monsanto distributors about Spray-Rite's price-cutting practices. It also noted that there was testimony that a Monsanto official had said that Spray-Rite was terminated because of the price complaints.

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[2] The three special interrogatories were as follows:

"1. Was the decision by Monsanto not to offer a new contract to plaintiff for 1969 made by Monsanto pursuant to a conspiracy or combination with one or more of its distributors to fix, maintain or stabilize resale prices of Monsanto herbicides?

"2. Were the compensation programs and/or areas of primary responsibility, and/or shipping policy created by Monsanto pursuant to a conspiracy to fix, maintain or stabilize resale prices on Monsanto herbicides?

"3. Did Monsanto conspire or combine with one or more of its distributors so that one or more of those distributors would limit plaintiff's access to Monsanto herbicides after 1968?" 684 F. 2d 1226, 1233 (CA7 1982).

The jury answered "Yes" to each of the interrogatories.

[3] See n. 6, *infra*.

[4] The court later in the same paragraph restated the standard of sufficiency as follows: "Proof of distributorship termination *in response to* competing distributors' complaints about the terminated distributor's pricing policies is sufficient to raise an inference of concerted action." 684 F. 2d, at 1239 (emphasis added). It may be argued that this standard is different from the one quoted in text in that this one requires a showing of a minimal causal connection between the complaints and the termination of the plaintiff, while the textual standard requires only that the one "follow" the other. As we explain *infra*, at 763–764, the difference is not ultimately significant in our analysis.

In substance, the Court of Appeals held that an antitrust plaintiff can survive a motion for a directed verdict if it shows that a manufacturer terminated a price-cutting distributor in response to or following complaints by other distributors. This view brought the Seventh Circuit into direct conflict with a number of other Courts of Appeals.[5] We granted certiorari to resolve the conflict. 460 U. S. 1010 (1983). We reject the statement by the Court of Appeals for the Seventh Circuit of the standard of proof required to submit a case to the jury in distributor-termination litigation, but affirm the judgment under the standard we announce today.[6]

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[5] The court below recognized that its standard was in conflict with that articulated in *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 637 F. 2d 105, 110–111 (CA3 1980), cert. denied, 451 U. S. 911 (1981). Other Courts of Appeals also have rejected the standard adopted by the Court of Appeals for the Seventh Circuit. See *Schwimmer* v. *Sony Corp. of America*, 677 F. 2d 946, 952–953 (CA2), cert. denied, 459 U. S. 1007 (1982); *Davis-Watkins Co.* v. *Service Merchandise*, 686 F. 2d 1190, 1199 (CA6 1982), cert. pending, No. 82–848; *Bruce Drug, Inc.* v. *Hollister Inc.*, 688 F. 2d 853, 856–857 (CA1 1982); see also *Blankenship* v. *Herzfeld*, 661 F. 2d 840, 845 (CA10 1981). The Court of Appeals for the Fourth Circuit has adopted the Seventh Circuit's standard. See *Bostick Oil Co.* v. *Michelin Tire Corp.*, 702 F. 2d 1207, 1213–1215 (1983). One panel of the Court of Appeals for the Eighth Circuit also has adopted that standard, see *Battle* v. *Lubrizol Corp.*, 673 F. 2d 984, 990–992 (1982), while another appears to have rejected it in an opinion issued the same day, see *Roesch, Inc.* v. *Star Cooler Corp.*, 671 F. 2d 1168, 1172 (1982). On rehearing en banc, the Court of Appeals was equally divided between the two positions. Compare *Roesch, Inc.* v. *Star Cooler Corp.*, 712 F. 2d 1235 (1983) (en banc), with *Battle* v. *Watson*, 712 F. 2d 1238, 1240 (1983) (en banc) (McMillian, J., dissenting).

[6] Monsanto also challenges another part of the Court of Appeals' opinion. It argues that the court held that the nonprice restrictions in this case—the compensation and shipping policies—would be judged under a rule of rea-

II

This Court has drawn two important distinctions that are at the center of this and any other distributor-termination

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son rather than a *per se* rule "'only if there is no allegation that the [nonprice] restrictions are part of a conspiracy to fix prices.'" Brief for Petitioner 15 (emphasis deleted) (quoting 684 F. 2d, at 1237). Monsanto asserts that under this holding a mere allegation that nonprice restrictions were part of a price conspiracy would subject them to *per se* treatment. Monsanto contends this view undermines our decision in *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36 (1977), that such restrictions are subject to the rule of reason.

If this were what the Court of Appeals held, it would present an arguable conflict. We think, however, that Monsanto misreads the court's opinion. Read in context, the court's somewhat broad language fairly may be read to say that a plaintiff must prove, as well as allege, that the nonprice restrictions were in fact a part of a price conspiracy. Thus, later in its opinion the court notes that the District Court properly instructed the jury that "Monsanto's otherwise lawful compensation programs and shipping policies were per se unlawful *if undertaken as part of an illegal scheme to fix prices.*" 684 F. 2d, at 1237 (emphasis added). The court cited *White Motor Co.* v. *United States*, 372 U. S. 253, 260 (1963), in which this Court wrote that restrictive practices ancillary to a price-fixing agreement would be restrained only if there was a *finding* that the two were sufficiently linked. And the Court of Appeals elsewhere noted the jury's finding that the nonprice practices here were "created by Monsanto pursuant to a conspiracy to fix . . . resale prices." 684 F. 2d, at 1233.

Monsanto does not dispute Spray-Rite's view that if the nonprice practices were proved to have been instituted as part of a price-fixing conspiracy, they would be subject to *per se* treatment. See Brief for Petitioner 23–27. Instead, Monsanto argues that there was insufficient evidence to support the jury's finding that the nonprice practices were "created by Monsanto pursuant to" a price-fixing conspiracy. Monsanto failed to make its sufficiency-of-the-evidence argument in the Court of Appeals with respect to this finding, see Brief for Defendant-Appellant Monsanto Co. in No. 80–2232 (CA7), pp. 27–34, and the court did not address the point. We therefore decline to reach it. See, *e. g.*, *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 147, n. 2 (1970); *Duignan* v. *United States*, 274 U. S. 195, 200 (1927).

In view of Monsanto's concession that a proper finding that nonprice practices were part of a price-fixing conspiracy would suffice to subject the entire conspiracy to *per se* treatment, *Sylvania* is not applicable to this case. First, there is the basic distinction between concerted and independent action—a distinction not always clearly drawn by parties and courts. Section 1 of the Sherman Act requires that there be a "contract, combination . . . or conspiracy" between the manufacturer and other distributors in order to establish a violation. 15 U. S. C. § 1. Independent action is not proscribed. A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently. *United States* v. *Colgate & Co.*, 250 U. S. 300, 307 (1919); cf. *United States* v. *Parke, Davis & Co.*, 362 U. S. 29 (1960). Under *Colgate*, the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination.

The second important distinction in distributor-termination cases is that between concerted action to set prices and concerted action on nonprice restrictions. The former have been *per se* illegal since the early years of national antitrust enforcement. See *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373, 404–409 (1911). The latter are judged under the rule of reason, which requires a weighing of the relevant circumstances of a case to decide whether a restrictive practice constitutes an unreasonable restraint on competition. See *Continental T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36 (1977).[7]

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case. In that case only a nonprice restriction was challenged. See 433 U. S., at 51, n. 18. Nothing in our decision today undercuts the holding of *Sylvania* that nonprice restrictions are to be judged under the rule of reason. In fact, the need to ensure the viability of *Sylvania* is an important consideration in our rejection of the Court of Appeals' standard of sufficiency of the evidence. See *infra*, at 763.

[7] The Solicitor General (by brief only) and several other *amici* suggest that we take this opportunity to reconsider whether "contract[s], combination[s] . . . or conspirac[ies]" to fix resale prices should always be unlawful. They argue that the economic effect of resale price maintenance is little different from agreements on nonprice restrictions. See generally *Continen-*

While these distinctions in theory are reasonably clear, often they are difficult to apply in practice. In *Sylvania* we emphasized that the legality of arguably anticompetitive conduct should be judged primarily by its "market impact." See, *e. g.*, *id.*, at 51. But the economic effect of all of the conduct described above—unilateral and concerted vertical price setting, agreements on price and nonprice restrictions—is in many, but not all, cases similar or identical. See, *e. g.*, *Parke, Davis*, *supra*, at 44; n. 7, *supra*. And judged from a distance, the conduct of the parties in the various situations can be indistinguishable. For example, the fact that a manufacturer and its distributors are in constant communication about prices and marketing strategy does not alone show that the distributors are not making independent pricing decisions. A manufacturer and its distributors have legitimate reasons to exchange information about the prices and the reception of their products in the market. Moreover, it is precisely in cases in which the manufacturer attempts to further a particular marketing strategy by means of agreements on often costly nonprice restrictions that it will have the most interest in the distributors' resale prices. The manufacturer often will want to ensure that its distributors earn sufficient profit to pay for programs such as hiring and

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tal T. V., Inc. v. *GTE Sylvania Inc.*, 433 U. S., at 69–70 (WHITE, J., concurring in judgment) (citing sources); Baker, Interconnected Problems of Doctrine and Economics in the Section One Labyrinth: Is *Sylvania* a Way Out?, 67 Va. L. Rev. 1457, 1465–1466 (1981). They say that the economic objections to resale price maintenance that we discussed in *Sylvania*, *supra*, at 51, n. 18—such as that it facilitates horizontal cartels—can be met easily in the context of rule-of-reason analysis.

Certainly in this case we have no occasion to consider the merits of this argument. This case was tried on *per se* instructions to the jury. Neither party argued in the District Court that the rule of reason should apply to a vertical price-fixing conspiracy, nor raised the point on appeal. In fact, neither party before this Court presses the argument advanced by *amici*. We therefore decline to reach the question, and we decide the case in the context in which it was decided below and argued here.

training additional salesmen or demonstrating the technical features of the product, and will want to see that "free-riders" do not interfere. See *Sylvania, supra,* at 55. Thus, the manufacturer's strongly felt concern about resale prices does not necessarily mean that it has done more than the *Colgate* doctrine allows.

Nevertheless, it is of considerable importance that independent action by the manufacturer, and concerted action on nonprice restrictions, be distinguished from price-fixing agreements, since under present law the latter are subject to *per se* treatment and treble damages. On a claim of concerted price fixing, the antitrust plaintiff must present evidence sufficient to carry its burden of proving that there was such an agreement. If an inference of such an agreement may be drawn from highly ambiguous evidence, there is a considerable danger that the doctrines enunciated in *Sylvania* and *Colgate* will be seriously eroded.

The flaw in the evidentiary standard adopted by the Court of Appeals in this case is that it disregards this danger. Permitting an agreement to be inferred merely from the existence of complaints, or even from the fact that termination came about "in response to" complaints, could deter or penalize perfectly legitimate conduct. As Monsanto points out, complaints about price cutters "are natural—and from the manufacturer's perspective, unavoidable—reactions by distributors to the activities of their rivals." Such complaints, particularly where the manufacturer has imposed a costly set of nonprice restrictions, "arise in the normal course of business and do not indicate illegal concerted action." *Roesch, Inc.* v. *Star Cooler Corp.*, 671 F. 2d 1168, 1172 (CA8 1982), on rehearing en banc, 712 F. 2d 1235 (CA8 1983) (affirming District Court judgment by an equally divided court). Moreover, distributors are an important source of information for manufacturers. In order to assure an efficient distribution system, manufacturers and distributors constantly must coordinate their activities to assure that their product will reach the consumer persuasively and efficiently. To bar a manufacturer from acting solely because the information upon which it acts originated as a price complaint would create an irrational dislocation in the market. See F. Warren-Boulton, Vertical Control of Markets 13, 164 (1978). In sum, "[t]o permit the inference of concerted action on the basis of receiving complaints alone and thus to expose the defendant to treble damage liability would both inhibit management's exercise of its independent business judgment and emasculate the terms of the statute." *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 637 F. 2d 105, 111, n. 2 (CA3 1980), cert. denied, 451 U. S. 911 (1981).[8]

Thus, something more than evidence of complaints is needed. There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently. As Judge Aldisert has written, the antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others "had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Edward J. Sweeney & Sons, supra*, at 111; accord, *H. L. Moore Drug Exchange* v. *Eli Lilly & Co.*, 662 F. 2d 935, 941 (CA2 1981), cert. denied, 459 U. S. 880 (1982); cf. *American Tobacco Co.* v. *United States*, 328 U. S. 781, 810 (1946) (Circumstances must reveal "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement").[9]

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[8] We do not suggest that evidence of complaints has no probative value at all, but only that the burden remains on the antitrust plaintiff to introduce additional evidence sufficient to support a finding of an unlawful contract, combination, or conspiracy.

[9] The concept of "a meeting of the minds" or "a common scheme" in a distributor-termination case includes more than a showing that the distributor conformed to the suggested price. It means as well that evidence must be presented both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer.

III

A

Applying this standard to the facts of this case, we believe there was sufficient evidence for the jury reasonably to have concluded that Monsanto and some of its distributors were parties to an "agreement" or "conspiracy" to maintain resale prices and terminate price cutters. In fact there was substantial *direct* evidence of agreements to maintain prices. There was testimony from a Monsanto district manager, for example, that Monsanto on at least two occasions in early 1969, about five months after Spray-Rite was terminated, approached price-cutting distributors and advised that if they did not maintain the suggested resale price, they would not receive adequate supplies of Monsanto's new corn herbicide. Tr. 1929–1934. When one of the distributors did not assent, this information was referred to the Monsanto regional office, and it complained to the distributor's parent company. There was evidence that the parent instructed its subsidiary to comply, and the distributor informed Monsanto that it would charge the suggested price. *Id.*, at 1933–1934. Evidence of this kind plainly is relevant and persuasive as to a meeting of minds.[10]

An arguably more ambiguous example is a newsletter from one of the distributors to his dealer-customers. The newsletter is dated October 1, 1968, just four weeks before Spray-Rite was terminated. It was written after a meeting between the author and several Monsanto officials, *id.*, at 2564, 2571–2573, and discusses Monsanto's efforts to "ge[t] the 'market place in order.'" App. A–65. The newsletter reviews some of Monsanto's incentive and shipping policies, and then states that in addition "every effort will be made to maintain a minimum market price level." *Id.*, at A–66. The newsletter relates these efforts as follows:

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[10] In addition, there was circumstantial evidence that Monsanto sought agreement from the distributor to conform to the resale price. The threat to cut off the distributor's supply came during Monsanto's "shipping season" when herbicide was in short supply. The jury could have concluded that Monsanto sought this agreement at a time when it was able to use supply as a lever to force compliance.

> "In other words, we are assured that Monsanto's company-owned outlets will not retail at less than their suggested retail price to the trade as a whole. Furthermore, those of us on the distributor level are not likely to deviate downward on price to anyone as the idea is implied that doing this possibly could discolor the outlook for continuity as one of the approved distributors during the future upcoming seasons. So, none interested in the retention of this arrangement is likely to risk being deleted from this customer service opportunity. Also, as far as the national accounts are concerned, they are sure to recognize the desirability of retaining Monsanto's favor on a continuing basis by respecting the wisdom of participating in the suggested program in a manner assuring order on the retail level 'playground' throughout the entire country. It is elementary that harmony can only come from following the rules of the game and that in case of dispute, the decision of the umpire is final." *Id.*, at A–66—A–67.

It is reasonable to interpret this newsletter as referring to an agreement or understanding that distributors and retailers would maintain prices, and Monsanto would not undercut those prices on the retail level and would terminate competitors who sold at prices below those of complying distributors; these were "the rules of the game."[11]

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[11] The newsletter also is subject to the interpretation that the distributor was merely describing the likely reaction to unilateral Monsanto pronouncements. But Monsanto itself appears to have construed the flyer as reporting a price-fixing understanding. Six weeks after the newsletter was written, a Monsanto official wrote its author a letter urging him to

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If, as the courts below reasonably could have found, there was evidence of an agreement with one or more distributors to maintain prices, the remaining question is whether the termination of Spray-Rite was part of or pursuant to that agreement. It would be reasonable to find that it was, since it is necessary for competing distributors contemplating compliance with suggested prices to know that those who do not comply will be terminated. Moreover, there is some circumstantial evidence of such a link. Following the termination, there was a meeting between Spray-Rite's president and a Monsanto official. There was testimony that the first thing the official mentioned was the many complaints Monsanto had received about Spray-Rite's prices. Tr. 774, 1295.[12] In addition, there was reliable testimony that Monsanto never discussed with Spray-Rite prior to the termination the distributorship criteria that were the alleged basis for the action. See 684 F. 2d, at 1239. By contrast, a former Monsanto salesman for Spray-Rite's area testified that Monsanto representatives on several occasions in 1965–1966 approached Spray-Rite, informed the distributor of complaints from other distributors—including one major and influential one, see Tr. 126, 135—and requested that prices be maintained. *Id.*, at 109–110, 114. Later that same year, Spray-Rite's president testified, Monsanto offi-

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"correct immediately any misconceptions about Monsanto's marketing policies." App. A–98. The letter disavowed any intent to enter into an agreement on resale prices. The interpretation of these documents and the testimony surrounding them properly was left to the jury.

[12] Monsanto argues that the reference could have been to complaints by Monsanto employees rather than distributors, suggesting that the price controls were merely unilateral action, rather than accession to the demands of the distributors. The choice between two reasonable interpretations of the testimony properly was left for the jury. See also Tr. 1298 (identifying source of one complaint as a distributor).

cials made explicit threats to terminate Spray-Rite unless it raised its prices. *Id.*, at 619, 711.[13]

IV

We conclude that the Court of Appeals applied an incorrect standard to the evidence in this case. The correct standard is that there must be evidence that tends to exclude the possibility of independent action by the manufacturer and distributor. That is, there must be direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective. Under this standard, the evidence in this case created a jury issue as to whether Spray-Rite was terminated pursuant to a price-fixing conspiracy between Monsanto and its distributors.[14] The judgment of the court below is affirmed.

It is so ordered.

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[13] The existence of the illegal joint boycott after Spray-Rite's termination, a finding that the Court of Appeals affirmed and that is not before us, is further evidence that Monsanto and its distributors had an understanding that prices would be maintained, and that price cutters would be terminated. This last, however, is also consistent with termination for other reasons, and is probative only of the ability of Monsanto and its distributors to act in concert.

[14] Monsanto's contrary evidence has force, but we agree with the courts below that it was insufficient to take the issue from the jury. It is true that there was no testimony of any complaints about Spray-Rite's pricing for the 15 months prior to termination. But it was permissible for the jury to conclude that there were complaints during that period from the evidence that they continued after 1968 and from the testimony that they were mentioned at Spray-Rite's post-termination meeting with Monsanto. There is also evidence that resale prices in fact did not stabilize after 1968. On the other hand, the former Monsanto salesman testified that prices were more stable in 1969–1970 than in his earlier stint in 1965–1966. *Id.*, at 217. And, given the evidence that Monsanto took active measures to stabilize prices, it may be that distributors did not assent in sufficient numbers, or broke their promises. In any event, we cannot say that the courts

JUSTICE WHITE took no part in the consideration or decision of this case.

JUSTICE BRENNAN, concurring.

As the Court notes, the Solicitor General has filed a brief in this Court for the United States as *amicus curiae* urging us to overrule the Court's decision in *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373 (1911). That decision has stood for 73 years, and Congress has certainly been aware of its existence throughout that time. Yet Congress has never enacted legislation to overrule the interpretation of the Sherman Act adopted in that case. Under these circumstances, I see no reason for us to depart from our longstanding interpretation of the Act. Because the Court adheres to that rule and, in my view, properly applies *Dr. Miles* to this case, I join the opinion and judgment of the Court.

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below erred in finding that Spray-Rite produced substantial evidence of the concerted action required by § 1 of the Sherman Act, and that—despite the sharp conflict in evidence—the case properly was submitted to the jury.

KEETON *v.* HUSTLER MAGAZINE, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 82-485. Argued November 8, 1983—Decided March 20, 1984

Petitioner, a resident of New York, brought a libel suit against respondent magazine publisher (hereafter respondent), an Ohio corporation, in Federal District Court in New Hampshire, alleging jurisdiction by reason of diversity of citizenship. Petitioner's only connection with New Hampshire is the circulation there of a magazine that she assists in producing. Respondent's contacts with New Hampshire consist of monthly sales of some 10,000 to 15,000 copies of its nationally published magazine. The District Court dismissed the suit on the ground that the Due Process Clause of the Fourteenth Amendment forbade application of New Hampshire's long-arm statute in order to acquire personal jurisdiction over respondent. The Court of Appeals affirmed, holding that petitioner's lack of contact with New Hampshire rendered that State's interest in redressing the tort of libel to petitioner too attenuated for an assertion of personal jurisdiction over respondent, and that in view of the "single publication rule," which would require an award of damages caused in all States, as well as New Hampshire's unusually long (6-year) limitation period for libel actions, it would be "unfair" to assert jurisdiction over respondent.

Held: Respondent's regular circulation of magazines in the forum State is sufficient to support an assertion of jurisdiction in a libel action based on the contents of the magazine. Pp. 773-781.

(a) New Hampshire jurisdiction over a complaint based on this circulation of magazines satisfies the Due Process Clause's requirement that a State's assertion of personal jurisdiction over a nonresident defendant be predicated on "minimum contacts" between the defendant and the State. Pp. 774-775.

(b) In judging minimum contacts, a court properly focuses on "the relationship among the defendant, the forum, and the litigation." *Shaffer* v. *Heitner*, 433 U. S. 186, 204. Thus, it is relevant to the jurisdictional inquiry here that petitioner is *seeking* to recover damages suffered in all States in one suit. The contacts between respondent and the forum must be judged in light of that claim, rather than a claim only for damages sustained in New Hampshire. P. 775.

(c) The combination of New Hampshire's interest in redressing injuries that occur within the State and its interest in cooperating with other States in applying the "single publication rule" demonstrates the propriety of requiring respondent to answer a multistate libel action in New Hampshire. Pp. 775–778.

(d) Any potential unfairness in applying New Hampshire's statute of limitations to all aspects of this nationwide suit has nothing to do with jurisdiction to adjudicate the claims. And the chance duration of statutes of limitations of nonforum States has nothing to do with the contacts among respondent, New Hampshire, and the suit. Pp. 778–779.

(e) The fact that petitioner has very limited contacts with New Hampshire does not defeat jurisdiction, since a plaintiff is not required to have "minimum contacts" with the forum State before that State is permitted to assert personal jurisdiction over a nonresident defendant. A plaintiff's residence in the forum State is not a separate jurisdictional requirement, and lack of residence will not defeat jurisdiction established on the basis of the defendant's contacts. The victim of a libel, like the victim of any other tort, may choose to bring suit in any forum with which the defendant has "certain minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co.* v. *Washington*, 326 U. S. 310, 316. Pp. 779–781.

(f) Here, where respondent has continuously and deliberately exploited the New Hampshire market, it must reasonably anticipate being haled into court there in a libel action based on the contents of its magazine. And, since respondent can be charged with knowledge of the "single publication rule," it must anticipate that such a suit will seek nationwide damages. There is no unfairness in calling respondent to answer for the contents of its national publication wherever a substantial number of copies are regularly sold and distributed. P. 781.

682 F. 2d 33, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, MARSHALL, BLACKMUN, POWELL, STEVENS, and O'CONNOR, JJ., joined. BRENNAN, J., filed an opinion concurring in the judgment, *post*, p. 782.

Norman Roy Grutman argued the cause for petitioner. With him on the briefs was *Jeffrey H. Daichman*.

Stephen M. Shapiro, by invitation of the Court, 464 U. S. 958, argued the cause as *amicus curiae* in support of the judgment below. *Lea Brilmayer*, *David Kahn*, and *Henry Monaghan* filed a brief for respondents.*

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*Briefs of *amici curiae* urging affirmance were filed for the Motor Vehicle Manufacturers Association by *Robert L. Stern*, *Stephen M. Shapiro*, JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner Kathy Keeton sued respondent Hustler Magazine, Inc., and other defendants in the United States District Court for the District of New Hampshire, alleging jurisdiction over her libel complaint by reason of diversity of citizenship. The District Court dismissed her suit because it believed that the Due Process Clause of the Fourteenth Amendment to the United States Constitution forbade the application of New Hampshire's long-arm statute in order to acquire personal jurisdiction over respondent. The Court of Appeals for the First Circuit affirmed, 682 F. 2d 33 (1982), summarizing its concerns with the statement that "the New Hampshire tail is too small to wag so large an out-of-state dog." *Id.*, at 36. We granted certiorari, 459 U. S. 1169 (1983), and we now reverse.

Petitioner Keeton is a resident of New York. Her only connection with New Hampshire is the circulation there of copies of a magazine that she assists in producing. The magazine bears petitioner's name in several places crediting her with editorial and other work. Respondent Hustler Magazine, Inc., is an Ohio corporation, with its principal place of business in California. Respondent's contacts with New Hampshire consist of the sale of some 10,000 to 15,000 copies of Hustler Magazine in that State each month. See App. 81a–86a. Petitioner claims to have been libeled in five separate issues of respondent's magazine published between September 1975 and May 1976.[1]

William H. Crabtree, and *Edward P. Good;* for the Association of American Publishers, Inc., by *R. Bruce Rich;* and for CBS Inc. et al. by *Robert D. Sack, Douglas P. Jacobs, Harvey L. Lipton, Peter C. Gould, Bruce W. Sanford*, and *Lawrence Gunnels*.

[1] Initially, petitioner brought suit for libel and invasion of privacy in Ohio, where the magazine was published. Her libel claim, however, was dismissed as barred by the Ohio statute of limitations, and her invasion-of-privacy claim was dismissed as barred by the New York statute of limita-

The Court of Appeals, in its opinion affirming the District Court's dismissal of petitioner's complaint, held that petitioner's lack of contacts with New Hampshire rendered the State's interest in redressing the tort of libel to petitioner too attenuated for an assertion of personal jurisdiction over respondent. The Court of Appeals observed that the "single publication rule" ordinarily applicable in multistate libel cases would require it to award petitioner "damages caused in *all* states" should she prevail in her suit, even though the bulk of petitioner's alleged injuries had been sustained outside New Hampshire. 682 F. 2d, at 35.[2] The court also stressed New Hampshire's unusually long (6-year) limitations period for libel actions. New Hampshire was the only State where petitioner's suit would not have been time-barred when it was filed. Under these circumstances, the Court of Appeals concluded that it would be "unfair" to assert jurisdiction over respondent. New Hampshire has a minimal interest in applying its unusual statute of limitations to, and awarding damages for, injuries to a nonresident occurring outside the State, particularly since petitioner suffered such a small proportion of her total claimed injury within the State. *Id.*, at 35–36.

We conclude that the Court of Appeals erred when it affirmed the dismissal of petitioner's suit for lack of personal jurisdiction. Respondent's regular circulation of magazines in the forum State is sufficient to support an assertion of ju-

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tions, which the Ohio court considered to be "migratory." Petitioner then filed the present action in October 1980.

[2] The "single publication rule" has been summarized as follows:

> "As to any single publication, (a) only one action for damages can be maintained; (b) all damages suffered in all jurisdictions can be recovered in the one action; and (c) a judgment for or against the plaintiff upon the merits of any action for damages bars any other action for damages between the same parties in all jurisdictions." Restatement (Second) of Torts § 577A(4) (1977).

risdiction in a libel action based on the contents of the magazine. This is so even if New Hampshire courts, and thus the District Court under *Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487 (1941), would apply the so-called "single publication rule" to enable petitioner to recover in the New Hampshire action her damages from "publications" of the alleged libel throughout the United States.[3]

The District Court found that "[t]he general course of conduct in circulating magazines throughout the state was purposefully directed at New Hampshire, and inevitably affected persons in the state." App. to Pet. for Cert. 5a. Such regular monthly sales of thousands of magazines cannot by any stretch of the imagination be characterized as random, isolated, or fortuitous. It is, therefore, unquestionable that New Hampshire jurisdiction over a complaint based on those contacts would ordinarily satisfy the requirement of the Due Process Clause that a State's assertion of personal jurisdiction over a nonresident defendant be predicated on "minimum contacts" between the defendant and the State. See *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U. S. 286, 297–298 (1980); *International Shoe Co.* v. *Washington*, 326 U. S. 310, 317 (1945). And, as the Court of Appeals acknowledged, New Hampshire has adopted a "long-arm" statute authorizing service of process on nonresident corporations whenever permitted by the Due Process Clause. 682 F. 2d, at 33.[4] Thus, all the requisites for personal juris-

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[3] "It is the general rule that each communication of the same defamatory matter by the same defamer, whether to a new person or to the same person, is a separate and distinct publication, for which a separate cause of action arises." *Id.*, § 577A, Comment *a*. The "single publication rule" is an exception to this general rule.

[4] New Hampshire Rev. Stat. Ann. § 300:14 (1977) provides in relevant part:

"If a foreign corporation . . . commits a tort in whole or in part in New Hampshire, such ac[t] shall be deemed to be doing business in New Hampshire by such foreign corporation and shall be deemed equivalent to the apdiction over Hustler Magazine, Inc., in New Hampshire are present.

We think that the three concerns advanced by the Court of Appeals, whether considered singly or together, are not sufficiently weighty to merit a different result. The "single publication rule," New Hampshire's unusually long statute of limitations, and plaintiff's lack of contacts with the forum State do not defeat jurisdiction otherwise proper under both New Hampshire law and the Due Process Clause.

In judging minimum contacts, a court properly focuses on "the relationship among the defendant, the forum, and the litigation." *Shaffer* v. *Heitner*, 433 U. S. 186, 204 (1977). See also *Rush* v. *Savchuk*, 444 U. S. 320, 332 (1980). Thus, it is certainly relevant to the jurisdictional inquiry that petitioner is *seeking* to recover damages suffered in all States in this one suit. The contacts between respondent and the forum must be judged in the light of that claim, rather than a claim only for damages sustained in New Hampshire. That is, the contacts between respondent and New Hampshire must be such that it is "fair" to compel respondent to defend a multistate lawsuit in New Hampshire seeking nationwide damages for all copies of the five issues in question, even though only a small portion of those copies were distributed in New Hampshire.

The Court of Appeals expressed the view that New Hampshire's "interest" in asserting jurisdiction over plaintiff's multistate claim was minimal. We agree that the "fairness" of

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pointment by such foreign corporation of the secretary of the state of New Hampshire and his successors to be its true and lawful attorney upon whom may be served all lawful process in any actions or proceedings against such foreign corporation arising from or growing out of such . . . tort."

This statute has been construed in the New Hampshire courts to extend jurisdiction over nonresident corporations to the fullest extent permitted under the Federal Constitution. See, *e. g.*, *Roy* v. *North American Newspaper Alliance, Inc.*, 106 N. H. 92, 95, 205 A. 2d 844, 846 (1964).

haling respondent into a New Hampshire court depends to some extent on whether respondent's activities relating to New Hampshire are such as to give that State a legitimate interest in holding respondent answerable on a claim related to those activities. See *World-Wide Volkswagen Corp.* v. *Woodson, supra,* at 292; *McGee* v. *International Life Ins. Co.*, 355 U. S. 220, 223 (1957). But insofar as the State's "interest" in adjudicating the dispute is a part of the Fourteenth Amendment due process equation, as a surrogate for some of the factors already mentioned, see *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, 456 U. S. 694, 702–703, n. 10 (1982), we think the interest is sufficient.

The Court of Appeals acknowledged that petitioner was suing, at least in part, for damages suffered in New Hampshire. 682 F. 2d, at 34. And it is beyond dispute that New Hampshire has a significant interest in redressing injuries that actually occur within the State.

> "'A state has an especial interest in exercising judicial jurisdiction over those who commit torts within its territory. This is because torts involve wrongful conduct which a state seeks to deter, and against which it attempts to afford protection, by providing that a tortfeasor shall be liable for damages which are the proximate result of his tort.'" *Leeper* v. *Leeper*, 114 N. H. 294, 298, 319 A. 2d 626, 629 (1974) (quoting Restatement (Second) of Conflict of Laws § 36, Comment *c* (1971)).

This interest extends to libel actions brought by nonresidents. False statements of fact harm both the subject of the falsehood *and* the readers of the statement. New Hampshire may rightly employ its libel laws to discourage the deception of its citizens. There is "no constitutional value in false statements of fact." *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323, 340 (1974).

New Hampshire may also extend its concern to the injury that in-state libel causes within New Hampshire to a nonresident. The tort of libel is generally held to occur wherever the offending material is circulated. Restatement (Second) of Torts § 577A, Comment *a* (1977). The reputation of the libel victim may suffer harm even in a State in which he has hitherto been anonymous.[5] The communication of the libel may create a negative reputation among the residents of a jurisdiction where the plaintiff's previous reputation was, however small, at least unblemished.

New Hampshire has clearly expressed its interest in protecting such persons from libel, as well as in safeguarding its populace from falsehoods. Its criminal defamation statute bears no restriction to libels of which residents are the victim.[6] Moreover, in 1971 New Hampshire specifically deleted from its long-arm statute the requirement that a tort be committed "against a resident of New Hampshire."[7]

New Hampshire also has a substantial interest in cooperating with other States, through the "single publication rule," to provide a forum for efficiently litigating all issues and damages claims arising out of a libel in a unitary proceeding.[8] This rule reduces the potential serious drain of libel cases on judicial resources. It also serves to protect defendants from harassment resulting from multiple suits. Restatement (Second) of Torts § 577A, Comment *f* (1977). In sum, the combination of New Hampshire's interest in redressing injuries that occur within the State and its interest in cooperating with other States in the application of the "single publication rule" demonstrates the propriety of requiring respondent to answer to a multistate libel action in New Hampshire.[9]

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[5] We do not, therefore, rely for our holding on the fact that petitioner's name appears in fine print in several places in a magazine circulating in New Hampshire.

[6] New Hampshire Rev. Stat. Ann. § 644:11(I) (1974) makes it a misdemeanor for anyone to "purposely communicat[e] to *any person*, orally or in writing, any information which he knows to be false and knows will tend to expose any other living person to public hatred, contempt or ridicule." (Emphasis added.)

[7] See N. H. Rev. Stat. Ann. § 300:14 (1977), History.

[8] The great majority of the States now follow the "single publication rule." Restatement (Second) of Torts § 577A, Appendix, Reporter's Note (1977).

The Court of Appeals also thought that there was an element of due process "unfairness" arising from the fact that the statutes of limitations in every jurisdiction except New Hampshire had run on the plaintiff's claim in this case.[10] Strictly speaking, however, any potential unfairness in applying New Hampshire's statute of limitations to all aspects of this nationwide suit has nothing to do with the jurisdiction of the court to adjudicate the claims. "The issue is personal jurisdiction, not choice of law." *Hanson* v. *Denckla*, 357 U. S. 235, 254 (1958). The question of the applicability of New Hampshire's statute of limitations to claims for out-of-state damages presents itself in the course of litigation only after jurisdiction over respondent is established, and we do not think that such choice-of-law concerns should complicate or distort the jurisdictional inquiry.

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[9] Of course, to conclude that petitioner may properly *seek* multistate damages in this New Hampshire suit is not to conclude that such damages should, in fact, be awarded if petitioner makes out her case for libel. The actual applicability of the "single publication rule" in the peculiar circumstances of this case is a matter of substantive law, not personal jurisdiction. We conclude only that the District Court has jurisdiction to *entertain* petitioner's multistate libel suit.

[10] Under traditional choice-of-law principles, the law of the forum State governs on matters of procedure. See Restatement (Second) of Conflict of Laws § 122 (1971). In New Hampshire, statutes of limitations are considered procedural. *Gordon* v. *Gordon*, 118 N. H. 356, 360, 387 A. 2d 339, 342 (1978); *Barrett* v. *Boston & Maine R. Co.*, 104 N. H. 70, 178 A. 2d 291 (1962). There has been considerable academic criticism of the rule that permits a forum State to apply its own statute of limitations regardless of the significance of contacts between the forum State and the litigation. See, *e. g.*, R. Weintraub, Commentary on the Conflict of Laws § 9.2B, p. 517 (2d ed. 1980); Martin, Constitutional Limitations on Choice of Law, 61 Cornell L. Rev. 185, 221 (1976); Comment, The Statute of Limitations and the Conflict of Laws, 28 Yale L. J. 492, 496–497 (1919). But we find it unnecessary to express an opinion at this time as to whether any arguable unfairness rises to the level of a due process violation.

The chance duration of statutes of limitations in nonforum jurisdictions has nothing to do with the contacts among respondent, New Hampshire, and this multistate libel action. Whether Ohio's limitations period is six months or six years does not alter the jurisdictional calculus in New Hampshire. Petitioner's successful search for a State with a lengthy statute of limitations is no different from the litigation strategy of countless plaintiffs who seek a forum with favorable substantive or procedural rules or sympathetic local populations. Certainly Hustler Magazine, Inc., which chose to enter the New Hampshire market, can be charged with knowledge of its laws and no doubt would have claimed the benefit of them if it had a complaint against a subscriber, distributor, or other commercial partner.

Finally, implicit in the Court of Appeals' analysis of New Hampshire's interest is an emphasis on the extremely limited contacts of the *plaintiff* with New Hampshire. But we have not to date required a plaintiff to have "minimum contacts" with the forum State before permitting that State to assert personal jurisdiction over a nonresident defendant. On the contrary, we have upheld the assertion of jurisdiction where such contacts were entirely lacking. In *Perkins* v. *Benguet Mining Co.*, 342 U. S. 437 (1952), none of the parties was a resident of the forum State; indeed, neither the plaintiff nor the subject matter of his action had any relation to that State. Jurisdiction was based solely on the fact that the defendant corporation had been carrying on in the forum "a continuous and systematic, but limited, part of its general business." *Id.*, at 438. In the instant case, respondent's activities in the forum may not be so substantial as to support jurisdiction over a cause of action unrelated to those activities.[11] But respondent is carrying on a "part of its general business" in New Hampshire, and that is sufficient to support jurisdiction when the cause of action arises out of the very activity being conducted, in part, in New Hampshire.

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[11] The defendant corporation's contacts with the forum State in *Perkins* were more substantial than those of respondent with New Hampshire in this case. In *Perkins*, the corporation's mining operations, located in the Philippine Islands, were completely halted during the Japanese occupation. The president, who was also general manager and principal stockholder of the company, returned to his home in Ohio where he carried on "a continu-

The plaintiff's residence is not, of course, completely irrelevant to the jurisdictional inquiry. As noted, that inquiry focuses on the relations among the defendant, the forum, and the litigation. Plaintiff's residence may well play an important role in determining the propriety of entertaining a suit against the defendant in the forum. That is, plaintiff's residence in the forum may, because of defendant's relationship with the plaintiff, enhance defendant's contacts with the forum. Plaintiff's residence may be the focus of the activities of the defendant out of which the suit arises. See *Calder* v. *Jones*, *post*, at 788–789; *McGee* v. *International Life Ins. Co.*, 355 U. S. 220 (1957). But plaintiff's residence in the forum State is not a separate requirement, and lack of residence will not defeat jurisdiction established on the basis of defendant's contacts.

It is undoubtedly true that the bulk of the harm done to petitioner occurred outside New Hampshire. But that will be true in almost every libel action brought somewhere other than the plaintiff's domicile. There is no justification for restricting libel actions to the plaintiff's home forum.[12] The victim of a libel, like the victim of any other tort, may choose to bring suit in any forum with which the defendant has "certain minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and sub-

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ous and systematic supervision of the necessarily limited wartime activities of the company." 342 U. S., at 448. The company's files were kept in Ohio, several directors' meetings were held there, substantial accounts were maintained in Ohio banks, and all key business decisions were made in the State. *Ibid.* In those circumstances, Ohio was the corporation's principal, if temporary, place of business so that Ohio jurisdiction was proper even over a cause of action unrelated to the activities in the State.

[12] As noted in *Calder* v. *Jones*, *post*, at 790–791, we reject categorically the suggestion that invisible radiations from the First Amendment may defeat jurisdiction otherwise proper under the Due Process Clause.

stantial justice.' *Milliken* v. *Meyer*, 311 U. S. 457, 463 [(1940)]." *International Shoe Co.* v. *Washington*, 326 U. S., at 316.

Where, as in this case, respondent Hustler Magazine, Inc., has continuously and deliberately exploited the New Hampshire market, it must reasonably anticipate being haled into court there in a libel action based on the contents of its magazine. *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U. S., at 297–298. And, since respondent can be charged with knowledge of the "single publication rule," it must anticipate that such a suit will seek nationwide damages. Respondent produces a national publication aimed at a nationwide audience. There is no unfairness in calling it to answer for the contents of that publication wherever a substantial number of copies are regularly sold and distributed.

The judgment of the Court of Appeals is reversed,[13] and the cause is remanded for proceedings consistent with this opinion.

It is so ordered.

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[13] In addition to Hustler Magazine, Inc., Larry Flynt, the publisher, editor, and owner of the magazine, and L. F. P., Inc., Hustler's holding company, were named as defendants in the District Court. It does not of course follow from the fact that jurisdiction may be asserted over Hustler Magazine, Inc., that jurisdiction may also be asserted over either of the other defendants. In *Calder* v. *Jones*, *post*, at 790, we today reject the suggestion that employees who act in their official capacity are somehow shielded from suit in their individual capacity. But jurisdiction over an employee does not automatically follow from jurisdiction over the corporation which employs him; nor does jurisdiction over a parent corporation automatically establish jurisdiction over a wholly owned subsidiary. *Consolidated Textile Co.* v. *Gregory*, 289 U. S. 85, 88 (1933); *Peterson* v. *Chicago, R. I. & P. R. Co.*, 205 U. S. 364, 391 (1907). Each defendant's contacts with the forum State must be assessed individually. See *Rush* v. *Savchuk*, 444 U. S. 320, 332 (1980) ("The requirements of *International Shoe* . . . must be met as to each defendant over whom a state court exercises jurisdiction"). Because the Court of Appeals concluded that jurisdiction could not be had even against Hustler Magazine, Inc., it did not inquire into the propriety of jurisdiction over the other defendants. Such inquiry is, of course, open upon remand.

JUSTICE BRENNAN, concurring in the judgment.

I agree with the Court that "[r]espondent's regular circulation of magazines in the forum State is sufficient to support an assertion of jurisdiction in a libel action based on the contents of the magazine." *Ante*, at 773–774. These contacts between the respondent and the forum State are sufficiently important and sufficiently related to the underlying cause of action to foreclose any concern that the constitutional limits of the Due Process Clause are being violated. This is so, moreover, irrespective of the State's interest in enforcing its substantive libel laws or its unique statute of limitations. Indeed, as we recently explained in *Insurance Corp. of Ireland* v. *Compagnie des Bauxites de Guinee*, 456 U. S. 694 (1982), these interests of the State should be relevant only to the extent that they bear upon the liberty interests of the respondent that are protected by the Fourteenth Amendment. "The restriction on state sovereign power described in *World-Wide Volkswagen Corp.* [v. *Woodson*, 444 U. S. 286, 291–292 (1980)] must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns." *Id.*, at 702–703, n. 10.

CALDER ET AL. *v.* JONES

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

No. 82-1401. Argued November 8, 1983—Decided March 20, 1984

Respondent, a professional entertainer who lives and works in California and whose television career was centered there, brought suit in California Superior Court, claiming that she had been libeled in an article written and edited by petitioners in Florida and published in the National Enquirer, a national magazine having its largest circulation in California. Petitioners, both residents of Florida, were served with process by mail in Florida, and, on special appearances, moved to quash the service of process for lack of personal jurisdiction. The Superior Court granted the motion on the ground that First Amendment concerns weighed against an assertion of jurisdiction otherwise proper under the Due Process Clause of the Fourteenth Amendment. The California Court of Appeal reversed, holding that a valid basis for jurisdiction existed on the theory that petitioners intended to, and did, cause tortious injury to respondent in California.

Held:

1. Jurisdiction by appeal does not lie in this Court, but under 28 U. S. C. § 2103 the jurisdictional statement will be treated as a petition for certiorari, which is hereby granted. Pp. 787-788.

2. Jurisdiction over petitioners in California is proper because of their intentional conduct in Florida allegedly calculated to cause injury to respondent in California. Pp. 788-791.

(a) The Due Process Clause permits personal jurisdiction over a defendant in any State with which the defendant has "certain minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co.* v. *Washington*, 326 U. S. 310, 316. In judging minimum contacts, a court properly focuses on "the relationship among the defendant, the forum, and the litigation." *Shaffer* v. *Heitner*, 433 U. S. 186, 204. P. 788.

(b) Here, California is the focal point both of the allegedly libelous article and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the "effects" of their Florida conduct in California. Pp. 788-789.

(c) Petitioners are not charged with mere untargeted negligence, but rather their intentional, and allegedly tortious, actions were expressly aimed at California. They wrote and edited an article that they knew would have a potentially devastating impact upon respondent, and they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the magazine has its largest circulation. Under these circumstances, petitioners must "reasonably anticipate being haled into court there" to answer for the truth of the statements made in the article. Pp. 789–790.

(d) While petitioners' contacts with California are not to be judged according to their employer's activities there, their status as employees does not insulate them from jurisdiction, since each defendant's contact with the forum State must be assessed individually. P. 790.

(e) First Amendment concerns do not enter into the jurisdictional analysis. Such concerns would needlessly complicate an already imprecise inquiry. Moreover, the potential chill on protected First Amendment activity stemming from defamation actions is already taken into account in the constitutional limitations on the substantive law governing such actions. Pp. 790–791.

138 Cal. App. 3d 128, 187 Cal. Rptr. 825, affirmed.

REHNQUIST, J., delivered the opinion for a unanimous Court.

John G. Kester argued the cause for petitioners. With him on the briefs was *Aubrey M. Daniel III.*

Paul S. Ablon argued the cause for respondent. With him on the brief were *Stephen S. Monroe* and *Richard P. Towne.**

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Shirley Jones brought suit in California Superior Court claiming that she had been libeled in an article written and edited by petitioners in Florida. The article was published in a national magazine with a large circulation in California. Petitioners were served with process by mail in Florida and caused special appearances to be entered on their behalf, moving to quash the service of process for lack of personal jurisdiction. The Superior Court granted the motion on the ground that First Amendment concerns weighed against an assertion of jurisdiction otherwise proper under the Due Process Clause. The California Court of Appeal reversed, rejecting the suggestion that First Amendment considerations enter into the jurisdictional analysis. We now affirm.

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*Briefs of *amici curiae* urging reversal were filed for the Association of American Publishers, Inc., by *R. Bruce Rich;* for the Authors League of America, Inc., by *Irwin Karp;* and for the Reporters Committee for Freedom of the Press et al. by *George R. Clark, Peter C. Gould, Barry D. Umansky, Harvey Lipton, Robert C. Lobdell, W. Terry Maguire, Robert D. Sack, Bruce W. Sanford, J. Laurent Scharff,* and *Richard M. Schmidt, Jr.*

Respondent lives and works in California. She and her husband brought this suit against the National Enquirer, Inc., its local distributing company, and petitioners for libel, invasion of privacy, and intentional infliction of emotional harm.[1] The Enquirer is a Florida corporation with its principal place of business in Florida. It publishes a national weekly newspaper with a total circulation of over 5 million. About 600,000 of those copies, almost twice the level of the next highest State, are sold in California.[2] Respondent's and her husband's claims were based on an article that appeared in the Enquirer's October 9, 1979, issue. Both the Enquirer and the distributing company answered the complaint and made no objection to the jurisdiction of the California court.

Petitioner South is a reporter employed by the Enquirer. He is a resident of Florida, though he frequently travels to California on business.[3] South wrote the first draft of the challenged article, and his byline appeared on it. He did most of his research in Florida, relying on phone calls to sources in California for the information contained in the article.[4] Shortly before publication, South called respondent's home and read to her husband a draft of the article so as to elicit his comments upon it. Aside from his frequent trips and phone calls, South has no other relevant contacts with California.

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[1] Respondent's husband subsequently filed a voluntary dismissal of his complaint.

[2] A geographic analysis of the total paid circulation for the September 18, 1979, issue of the Enquirer showed total sales, national and international, of 5,292,200. Sales in California were 604,431. The State with the next highest total was New York, with 316,911. App. 39–41.

[3] South stated that during a 4-year period he visited California more than 20 times. *Id.*, at 32. A friend estimated that he came to California from 6 to 12 times each year. *Id.*, at 66.

[4] The Superior Court found that South made at least one trip to California in connection with the article. South hotly disputes this finding, claim-

Petitioner Calder is also a Florida resident. He has been to California only twice—once, on a pleasure trip, prior to the publication of the article and once after to testify in an unrelated trial. Calder is president and editor of the Enquirer. He "oversee[s] just about every function of the Enquirer." App. 24. He reviewed and approved the initial evaluation of the subject of the article and edited it in its final form. He also declined to print a retraction requested by respondent. Calder has no other relevant contacts with California.

In considering petitioners' motion to quash service of process, the Superior Court surmised that the actions of petitioners in Florida, causing injury to respondent in California, would ordinarily be sufficient to support an assertion of jurisdiction over them in California.[5] But the court felt that special solicitude was necessary because of the potential "chilling effect" on reporters and editors which would result from requiring them to appear in remote jurisdictions to answer for the content of articles upon which they worked. The court also noted that respondent's rights could be "fully satisfied" in her suit against the publisher without requiring petitioners to appear as parties. The Superior Court, therefore, granted the motion.

The California Court of Appeal reversed. 138 Cal. App. 3d 128, 187 Cal. Rptr. 825 (1982). The court agreed that neither petitioner's contacts with California would be sufficient

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ing that an uncontroverted affidavit shows that he never visited California to research the article. Since we do not rely for our holding on the alleged visit, see n. 6, *infra*, we find it unnecessary to consider the contention.

[5] California's "long-arm" statute permits an assertion of jurisdiction over a nonresident defendant whenever permitted by the State and Federal Constitutions. California Civ. Proc. Code Ann. § 410.10 (West 1973) provides: "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."

for an assertion of jurisdiction on a cause of action unrelated to those contacts. See *Perkins* v. *Benguet Mining Co.*, 342 U. S. 437 (1952) (permitting general jurisdiction where defendant's contacts with the forum were "continuous and systematic"). But the court concluded that a valid basis for jurisdiction existed on the theory that petitioners intended to, and did, cause tortious injury to respondent in California. The fact that the actions causing the effects in California were performed outside the State did not prevent the State from asserting jurisdiction over a cause of action arising out of those effects.[6] The court rejected the Superior Court's conclusion that First Amendment considerations must be weighed in the scale against jurisdiction.

A timely petition for hearing was denied by the Supreme Court of California. App. 122. On petitioners' appeal to this Court, probable jurisdiction was postponed. 460 U. S. 1080 (1983). We conclude that jurisdiction by appeal does not lie. *Kulko* v. *California Superior Court*, 436 U. S. 84, 90, and n. 4 (1978).[7] Treating the jurisdictional statement as a petition for writ of certiorari, as we are authorized to do, 28 U. S. C. §2103, we hereby grant the petition.[8]

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[6] The Court of Appeal further suggested that petitioner South's investigative activities, including one visit and numerous phone calls to California, formed an independent basis for an assertion of jurisdiction over him in this action. In light of our approval of the "effects" test employed by the California court, we find it unnecessary to reach this alternative ground.

[7] *Kulko* involved an assertion of jurisdiction under the same California statute at issue here. The Court held that the case was improperly brought to the Court as an appeal, since no state statute was "drawn in question . . . on the ground of its being repugnant to the Constitution, treaties or laws of the United States," 28 U. S. C. § 1257(2). Petitioners attempt to distinguish *Kulko* on the ground that the defendant in that case argued only that the Due Process Clause precluded the exercise of *in personam* jurisdiction over him, whereas petitioners argued below that the California statute as applied to them would be unconstitutional. We are unpersuaded by this shift in emphasis. The jurisdictional statute construed by the California Court of Appeal provides that the State's jurisdiction is as broad as the Constitution permits. See n. 5, *supra*. As in *Kulko*, the opinion below does not purport to determine the constitutionality of the California jurisdictional statute. Rather, the question decided was whether the Constitution itself would permit the assertion of jurisdic-

The Due Process Clause of the Fourteenth Amendment to the United States Constitution permits personal jurisdiction over a defendant in any State with which the defendant has "certain minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' *Milliken* v. *Meyer*, 311 U. S. 457, 463." *International Shoe Co.* v. *Washington*, 326 U. S. 310, 316 (1945). In judging minimum contacts, a court properly focuses on "the relationship among the defendant, the forum, and the litigation." *Shaffer* v. *Heitner*, 433 U. S. 186, 204 (1977). See also *Rush* v. *Savchuk*, 444 U. S. 320, 332 (1980). The plaintiff's lack of "contacts" will not defeat otherwise proper jurisdiction, see *Keeton* v. *Hustler Magazine, Inc.*, *ante*, at 779–781, but they may be so manifold as to permit jurisdiction when it would not exist in their absence. Here, the plaintiff is the focus of the activities of the defendants out of which the suit arises. See *McGee* v. *International Life Ins. Co.*, 355 U. S. 220 (1957).

The allegedly libelous story concerned the California activities of a California resident. It impugned the professionalism of an entertainer whose television career was centered in California.[9] The article was drawn from California sources,

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tion. Under the circumstances, we find an appeal improper regardless of the terminology in which the petitioners couch their jurisdictional defense.

[8] Although there has not yet been a trial on the merits in this case, the judgment of the California appellate court "is plainly final on the federal issue and is not subject to further review in the state courts." *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 485 (1975). Accordingly, as in several past cases presenting jurisdictional issues in this posture, "we conclude that the judgment below is final within the meaning of [28 U. S. C.] § 1257." *Shaffer* v. *Heitner*, 433 U. S. 186, 195–196, n. 12 (1977). See also *Rush* v. *Savchuk*, 444 U. S. 320 (1980); *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U. S. 286 (1980); *Kulko* v. *California Superior Court*, 436 U. S. 84 (1978).

[9] The article alleged that respondent drank so heavily as to prevent her from fulfilling her professional obligations.

and the brunt of the harm, in terms both of respondent's emotional distress and the injury to her professional reputation, was suffered in California. In sum, California is the focal point both of the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in California based on the "effects" of their Florida conduct in California. *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U. S. 286, 297–298 (1980); Restatement (Second) of Conflict of Laws § 37 (1971).

Petitioners argue that they are not responsible for the circulation of the article in California. A reporter and an editor, they claim, have no direct economic stake in their employer's sales in a distant State. Nor are ordinary employees able to control their employer's marketing activity. The mere fact that they can "foresee" that the article will be circulated and have an effect in California is not sufficient for an assertion of jurisdiction. *World-Wide Volkswagen Corp.* v. *Woodson*, *supra*, at 295; *Rush* v. *Savchuk*, *supra*, at 328–329. They do not "in effect appoint the [article their] agent for service of process." *World-Wide Volkswagen Corp.* v. *Woodson*, *supra*, at 296. Petitioners liken themselves to a welder employed in Florida who works on a boiler which subsequently explodes in California. Cases which hold that jurisdiction will be proper over the manufacturer, *Buckeye Boiler Co.* v. *Superior Court*, 71 Cal. 2d 893, 458 P. 2d 57 (1969); *Gray* v. *American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N. E. 2d 761 (1961), should not be applied to the welder who has no control over and derives no direct benefit from his employer's sales in that distant State.

Petitioners' analogy does not wash. Whatever the status of their hypothetical welder, petitioners are not charged with mere untargeted negligence. Rather, their intentional, and allegedly tortious, actions were expressly aimed at California. Petitioner South wrote and petitioner Calder edited an article that they knew would have a potentially devastating impact upon respondent. And they knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the National Enquirer has its largest circulation. Under the circumstances, petitioners must "reasonably anticipate being haled into court there" to answer for the truth of the statements made in their article. *World-Wide Volkswagen Corp.* v. *Woodson*, *supra*, at 297; *Kulko* v. *California Superior Court*, *supra*, at 97–98; *Shaffer* v. *Heitner*, *supra*, at 216. An individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California.

Petitioners are correct that their contacts with California are not to be judged according to their employer's activities there. On the other hand, their status as employees does not somehow insulate them from jurisdiction. Each defendant's contacts with the forum State must be assessed individually. See *Rush* v. *Savchuk*, *supra*, at 332 ("The requirements of *International Shoe* . . . must be met as to each defendant over whom a state court exercises jurisdiction"). In this case, petitioners are primary participants in an alleged wrongdoing intentionally directed at a California resident, and jurisdiction over them is proper on that basis.

We also reject the suggestion that First Amendment concerns enter into the jurisdictional analysis. The infusion of such considerations would needlessly complicate an already imprecise inquiry. *Estin* v. *Estin*, 334 U. S. 541, 545 (1948). Morever, the potential chill on protected First Amendment activity stemming from libel and defamation actions is already taken into account in the constitutional limitations on the substantive law governing such suits. See *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964); *Gertz* v. *Robert Welch, Inc.*, 418 U. S. 323 (1974). To reintroduce those concerns at the jurisdictional stage would be a form of double counting. We have already declined in other contexts to grant special procedural protections to defendants in libel and defamation actions in addition to the constitutional protections embodied in the substantive laws. See, *e. g.*, *Herbert* v. *Lando*, 441 U. S. 153 (1979) (no First Amendment privilege bars inquiry into editorial process). See also *Hutchinson* v. *Proxmire*, 443 U. S. 111, 120, n. 9 (1979) (implying that no special rules apply for summary judgment).

We hold that jurisdiction over petitioners in California is proper because of their intentional conduct in Florida calculated to cause injury to respondent in California. The judgment of the California Court of Appeal is

Affirmed.

UNITED STATES *v.* WEBER AIRCRAFT CORP. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 82-1616. Argued January 11, 1984—Decided March 20, 1984

When the engine of an Air Force aircraft failed in flight, the pilot was severely injured when he ejected from the plane. After Air Force collateral and safety investigations of the incident had been completed, the pilot filed a damages action against respondents as the entities responsible for the design and manufacture of the plane's ejection equipment. Respondents sought pretrial discovery of documents containing confidential unsworn statements made during the safety investigation by the pilot and the airman who had rigged and maintained the pilot's parachute equipment. But such discovery was prevented by *Machin* v. *Zukert*, 114 U. S. App. D. C. 335, 316 F. 2d 336, cert. denied, 375 U. S. 896, which held that confidential statements made to air crash safety investigators are privileged with respect to pretrial discovery. Respondents then filed requests for the statements under the Freedom of Information Act (FOIA) and, when the Air Force refused production, commenced an action in Federal District Court, which held that the statements were protected from disclosure by Exemption 5 of the FOIA, which exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." The Court of Appeals reversed, holding that although the requested documents were "intra-agency memorandums" within the meaning of Exemption 5 and were protected from civil discovery under the *Machin* privilege, the statutory phrase "would not be available by law" did not encompass every civil discovery privilege but rather reached only those privileges explicitly recognized in the FOIA's legislative history, which the court read as not extending to the *Machin* privilege.

Held: The statements in question are protected from disclosure by Exemption 5. The Exemption's plain language, as construed by this Court's prior decisions, is sufficient to resolve the question presented. The statements are unquestionably "intra-agency memorandums or letters" within the meaning of the Exemption, and, since the *Machin* privilege normally protects them from civil discovery, they "would not be available by law to a party other than [the Air Force] in litigation with [the Air Force]." Exemption 5's scope is not limited to privileges explicitly identified by Congress in the FOIA's legislative history. To hold that material that is normally privileged can be obtained through the FOIA would create an anomaly in that the FOIA could be used to supplement civil discovery. And Exemption 5's legislative history does not contain the kind of compelling evidence of congressional intent that would necessitate looking beyond the plain statutory language, but rather indicates that Congress intended to incorporate governmental privileges analogous to the *Machin* privilege. Pp. 798–804.

688 F. 2d 638, reversed.

STEVENS, J., delivered the opinion for a unanimous Court.

Samuel A. Alito, Jr., argued the cause for the United States. With him on the briefs were *Solicitor General Lee*, *Assistant Attorney General McGrath*, *Deputy Solicitor General Geller*, *Leonard Schaitman*, and *Wendy M. Keats*.

Jacques E. Soiret argued the cause for respondents. With him on the brief for respondent Weber Aircraft Corp. were *Marshall Silberberg* and *Robert M. Churella*. *Lawrence J. Galardi* and *Dean F. Cochran* filed a brief for respondent Mills Manufacturing Corp.*

JUSTICE STEVENS delivered the opinion of the Court.

The Freedom of Information Act (FOIA), 5 U. S. C. § 552 (1982 ed.), requires federal agencies to disclose records[1] that

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*Briefs of *amici curiae* urging affirmance were filed for the Reporters Committee for Freedom of the Press et al. by *Karen Syma Shinberg Czapanskiy;* for United States Forgecraft Corp. by *Donald A. Way;* and for Inderjit Badhwar et al. by *Raymond D. Battocchi* and *Alfred F. Belcuore.*

[1] "On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action." 5 U. S. C. § 552(a)(4)(B) (1982 ed.).

do not fall into one of nine exempt categories.[2] The question presented is whether confidential statements obtained during an Air Force investigation of an air crash are protected from disclosure by Exemption 5, which exempts "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

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[2] "This section does not apply to matters that are—

"(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

"(2) related solely to the internal personnel rules and practices of an agency;

"(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

"(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

"(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

"(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

"(7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

"(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

"(9) geological and geophysical information and data, including maps, concerning wells." 5 U. S. C. § 552(b) (1982 ed.).

I

On October 9, 1973, the engine of an Air Force F-106B aircraft failed in flight. Captain Richard Hoover, the pilot, was severely injured when he ejected from the plane. Under Air Force regulations, the incident was a significant air crash that required two separate investigations: a "collateral investigation" and a "safety investigation."

The collateral investigation is conducted "to preserve available evidence for use in claims, litigation, disciplinary actions, administrative proceedings, and all other purposes."[3] Witnesses in a collateral investigation testify under oath and generally are protected by the procedural safeguards that are applicable in other formal hearings. The record of the collateral investigation is public.

The safety investigation is quite different. It is conducted by a specially appointed tribunal which prepares a report that is intended for "the sole purpose of taking corrective action in the interest of accident prevention."[4] To encourage witnesses to speak fully and frankly, they are not sworn and receive an assurance that their statements will not be used for any purpose other than accident prevention.[5] Air Force regulations contain a general prohibition against the release of safety investigation reports and their attachments,[6] subject to an exception which allows the Judge Advocate General to release specified categories of "factual material" and "nonpersonal evidence."[7]

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[3] Air Force Regulations 110–14, ¶ 1(a) (July 18, 1977).

[4] Air Force Regulations 127–4, ¶ 19(a)(1) (Jan. 1, 1973).

[5] *Id.*, ¶ 3–8(d) (Jan. 18, 1980).

[6] *Id.*, ¶ 19(a)(3) (Jan. 1, 1973); *id.*, ¶¶ 2–4, 2–5 (Jan. 18, 1980).

[7] *Id.*, ¶ 19(a)(4) (Jan. 1, 1973) states: "Notwithstanding the restrictions on use of these reports and their attachments and the prohibitions in this regulation against their release, factual material included in

After the collateral and safety investigations had been completed, Captain Hoover filed a damages action against various entities responsible for the design and manufacture of his plane's ejection equipment.[8] During pretrial discovery in that litigation, two of the parties (respondents Weber[9] and Mills[10]) sought discovery of all Air Force investigative reports pertaining to the accident. The Air Force released the entire record of the collateral investigation, as well as certain factual portions of the safety investigation, but it refused to release the confidential portions of the safety investigation.

Confidential statements made to air crash safety investigators were held to be privileged with respect to pretrial discovery over 20 years ago. *Machin* v. *Zukert*, 114 U. S. App. D. C. 335, 316 F. 2d 336, cert. denied, 375 U. S. 896 (1963). That holding effectively prevented respondents from obtaining the pretrial discovery they sought—specifically the unsworn statements given by Captain Hoover and by the airman who had rigged and maintained his parachute equipment. Respondents therefore filed requests for those statements under the FOIA, and when the Air Force refused production, they commenced this action.

In the District Court the Government filed an affidavit executed by the General responsible for Air Force safety investigations, explaining that the material that had been withheld

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accident/incident reports, covering examination of wreckage, photographs, plotting charts, wreckage diagrams, maps, transcripts of air traffic communications, weather reports, maintenance records, crew qualifications, and like nonpersonal evidence may be released as required by law or pursuant to court order or upon specific authorization of The Judge Advocate General after consultation with The Inspector General. Also, Federal law requires that an accused in a trial by court-martial will, upon proper court order, be furnished all statements sworn or unsworn in any form which have been given to any Federal agent, employee, investigating officer, or board by any witness who testifies against the accused."

[8] *Hoover* v. *Weber Aircraft Corp.*, No. CV 74-1064-WPG (CD Cal.).

[9] Weber Aircraft Corp.

[10] Mills Manufacturing Corp.

contained "conclusions, speculations, findings and recommendations made by the Aircraft Mishap Investigators" as well as "testimony provided by witnesses under a pledge of confidentiality." App. 38. The affidavit explained why the General believed that the national security would be adversely affected by the disclosure of such material.[11] The District Court held that the material at issue would not be available by law to a party other than an agency in litigation with an agency, and hence need not be disclosed by virtue of

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[11] "[T]he release of the withheld portions of the Aircraft Mishap Investigation for litigation purposes would be harmful to our national security. The strength of the United States Air Force, upon which our national security is greatly dependent, is seriously affected by the number of major aircraft accidents which occur. The successful flight safety program of the United States Air Force has contributed greatly to the continuously decreasing rate of such accidents. The effectiveness of this program depends to a large extent upon our ability to obtain full and candid information on the cause of each aircraft accident. Much of the information received from persons giving testimony in the course of an aircraft mishap investigation is conjecture, speculation and opinion. Such full and frank disclosure is not only encouraged but is imperative to a successful flight safety program. Open and candid testimony is received because witnesses are promised that for the particular investigation their testimony will be used solely for the purpose of flight safety and will not be disclosed outside of the Air Force. Lacking authority to subpoena witnesses, accident investigators must rely on such assurances in order to obtain full and frank discussion concerning all the circumstances surrounding an accident. Witnesses are encouraged to express personal criticisms concerning the accident.

. . . . .

"If aircraft mishap investigators were unable to give such assurances, or if it were felt that such promises were hollow, testimony and input from witnesses and from manufacturers in many instances would be less than factual and a determination of the exact cause factors of accidents would be jeopardized. This would seriously hinder the accomplishment of prompt corrective action designed to preclude the occurrence of a similar accident. This privilege, properly accorded to the described portions of an United States Air Force Mishap Report of Investigation, including those portions reflecting the deliberations of the Investigating Board, is the very foundation of a successful Air Force flight safety program." App. 38–39.

Exemption 5.[12] The Court of Appeals reversed. 688 F. 2d 638 (CA9 1982). It agreed that the requested documents were "intra-agency memorandums" within the meaning of Exemption 5, and that they were protected from civil discovery under the *Machin* privilege. It held, however, that the statutory phrase "would not be available by law" did not encompass every civil discovery privilege but rather reached only those privileges explicitly recognized in the legislative history of the FOIA. It read that history as accepting an executive privilege for predecisional documents containing advice, opinions, or recommendations of Government agents, but as not extending to the *Machin* civil discovery privilege for official Government information. It accordingly remanded the case with directions to disclose the factual portions of the witnesses' statements.

II

The plain language of the statute itself, as construed by our prior decisions, is sufficient to resolve the question presented. The statements of the two witnesses are unquestionably "intra-agency memorandums or letters"[13] and, since the *Machin* privilege normally protects them from discovery in civil litigation, they "would not be available by law to a party other than [the Air Force] in litigation with [the Air Force]."[14]

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[12] The District Court also held that a medical report sought by respondents was covered by Exemption 5, and that disclosure of both the report and the statements was inappropriate because in its view the public interest in maintaining confidentiality outweighed respondents' interests in obtaining the material. The Court of Appeals rejected both of these holdings, and the Government does not seek review on either.

[13] Weber contends that "intra-agency memorandums or letters" cannot include statements made by civilians to Air Force personnel. Whatever the merits of this assertion, it is irrelevant to this case since the material at issue here includes only statements made by Air Force personnel.

[14] Weber contends that the material at issue is not privileged because it was not obtained pursuant to a promise of confidentiality. However,

Last Term, in *FTC* v. *Grolier Inc.*, 462 U. S. 19 (1983), we held that Exemption 5 simply incorporates civil discovery privileges: "The test under Exemption 5 is whether the documents would be 'routinely' or 'normally' disclosed upon a showing of relevance." *Id.*, at 26.[15] Thus, since the *Machin* privilege is well recognized in the case law as precluding routine disclosure of the statements, the statements are covered by Exemption 5.

Grolier was consistent with our prior cases. For example, *Grolier* itself relied on *Renegotiation Board* v. *Grumman Aircraft Engineering Corp.*, 421 U. S. 168 (1975), which *Grolier* quoted on the scope of Exemption 5: "'Exemption 5 incorporates the privileges which the Government enjoys under the relevant statutory and *case law* in the pretrial discovery context.'" 462 U. S., at 26–27 (emphasis added in *Grolier*) (quoting 421 U. S., at 184). Similarly, in *NLRB* v. *Sears, Roebuck & Co.*, 421 U. S. 132 (1975), we wrote: "Exemption 5 withholds from a member of the public documents which a private party could not discover in litigation with the agency." *Id.*, at 148.[16] In *Federal Open Market Committee* v. *Merrill*, 443 U. S. 340 (1979), we wrote: "The House Report [on the FOIA] states that Exemption 5 was intended to

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the District Court found otherwise, and since that finding is supported by an uncontroverted affidavit submitted by the Government to the District Court, see *id.*, at 38, there is no basis for setting it aside. In all other respects, respondents concede that the requested material is covered by the *Machin* privilege, and did not file a cross-petition for certiorari challenging the Court of Appeals' conclusion that the requested material was privileged. Thus, we assume without deciding that the material respondents seek is privileged, and do not consider the arguments of *amici* that no privilege is applicable here. See *United Parcel Service, Inc.* v. *Mitchell*, 451 U. S. 56, 60, n. 2 (1981); *Bell* v. *Wolfish*, 441 U. S. 520, 531–532, n. 13 (1979); *Knetsch* v. *United States*, 364 U. S. 361, 370 (1960).

[15] See also 462 U. S., at 28 (BRENNAN, J., concurring in part and concurring in judgment).

[16] See also 421 U. S., at 149 (footnote omitted) ("[I]t is reasonable to construe Exemption 5 to exempt those documents, and only those documents, normally privileged in the civil discovery context").

allow an agency to withhold intra-agency memoranda which would not 'routinely be disclosed to a private party through the discovery process in litigation with the agency . . . .'" *Id.*, at 353 (quoting H. R. Rep. No. 1497, 89th Cong., 2d Sess., 10 (1966)). And in *EPA* v. *Mink*, 410 U. S. 73 (1973), the Court observed: "This language clearly contemplates that the public is entitled to all such memoranda or letters that a private party could discover in litigation with the agency." *Id.*, at 86.[17]

Respondents read *Merrill* as limiting the scope of Exemption 5 to privileges explicitly identified by Congress in the legislative history of the FOIA. But in *Merrill* we were confronted with a claimed exemption that was not clearly covered by a recognized pretrial discovery privilege. We held that Exemption 5 protected the Federal Open Market Committee's Domestic Policy Directives although it was not entirely clear that they fell within any recognized civil discovery privilege because statements in the legislative history supported an inference that Congress intended to recognize such a privilege. See 443 U. S., at 357–360. Thus, the *holding* of *Merrill* was that a privilege that was mentioned in the legislative history of Exemption 5 is incorporated by the Exemption—not that all privileges not mentioned are excluded. Moreover, the *Merrill* dictum upon which respondents rely merely indicates "that it is not clear that Exemption 5 was intended to incorporate every privilege known to civil discovery." *Id.*, at 354. It is one thing to say that recognition under Exemption 5 of a novel privilege, or one that has found less than universal acceptance, might not fall within Exemption 5 if not discussed in its legislative history. It is quite another to say that the *Machin* privilege, which has been well settled for some two decades, need be viewed with the same degree of skepticism.[18] In any event, the *Merrill* dictum concludes only that "a claim that a privilege other than executive privilege or the attorney privilege is covered by Exemption 5 must be viewed with caution." 443 U. S., at 355. The claim of privilege sustained in *Machin* was denominated as one of executive privilege. See 114 U. S. App. D. C., at 337, 316 F. 2d, at 338.[19] Hence the dictum is of little aid to respondents.

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[17] Respondents contend that *Mink* stands for the proposition that purely factual material can never qualify for protection under Exemption 5. However, the relevant portion of *Mink* merely states that otherwise nonprivileged factual material cannot be withheld under Exemption 5 merely because it appears in the same document as privileged material, and that Congress intended to adopt the relevant case law on privilege. Moreover, *Mink* cited *Machin* with approval as part of that case law. See 410 U. S., at 87–91, and n. 14. This reading of *Mink* is confirmed by the 1974 amendment to the FOIA which provides: "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection." 5 U. S. C. § 552(b) (1982 ed.). This amendment constituted Congress' codification of this aspect of *Mink*. See S. Rep. No. 93–854, p. 32 (1974); 120 Cong. Rec. 17021 (1974) (remarks of Sen. Hruska).

Moreover, respondents' contention that they can obtain through the FOIA material that is normally privileged would create an anomaly in that the FOIA could be used to supplement civil discovery. We have consistently rejected such a construction of the FOIA. See *Baldrige* v. *Shapiro*, 455 U. S. 345, 360, n. 14 (1982); *NLRB* v. *Sears, Roebuck & Co.*, 421 U. S., at 143, n. 10; *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U. S. 1, 24 (1974). We do not think that Congress could have intended that the weighty policies underlying discovery privileges could be so easily circumvented.[20]

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[18] Moreover, in the *Merrill* dictum we added: "We hesitate to construe Exemption 5 to incorporate a civil discovery privilege that would substantially duplicate another exemption." 443 U. S., at 355. Respondents do not explain how incorporation of the *Machin* privilege into Exemption 5 would substantially duplicate another exemption. The relevance of the *Merrill* dictum is further reduced by the fact that in *Merrill* the Court explicitly reserved the question whether the *Machin* privilege falls within Exemption 5. See 443 U. S., at 355–356, n. 17. Thus *Merrill* could hardly control the question we face today.

[19] The regulation governing the *Machin* privilege also describes it as executive privilege. Air Force Regulations 127–4, ¶2–5 (Jan. 18, 1980).

Finally, the legislative history of Exemption 5 does not contain the kind of compelling evidence of congressional intent that would be necessary to persuade us to look beyond the plain statutory language. Because of the difficulty inherent in compiling an exhaustive list of evidentiary privileges,[21] it would be impractical to treat the legislative history of Exemption 5 as containing a comprehensive list of all privileges Congress intended to adopt. Rather, the history of Exemption 5 can be understood by means of "rough analogies." *EPA* v. *Mink*, *supra*, at 86. The legislative history of Exemption 5 indicates that Congress intended to incorporate governmental privileges analogous to the *Machin* privilege. That history recognizes a need for claims of privilege when confidentiality is necessary to ensure frank and open discussion and hence efficient governmental operations. See *Grolier*, 462 U. S., at 27-28; *Merrill*, 443 U. S., at 359; *Renegotiation Board* v. *Grumman Aircraft Engineering Corp.*, 421 U. S., at 186, 189-190; *NLRB* v. *Sears, Roebuck & Co.*, *supra*, at 150-152; *Mink*, *supra*, at 86-89; H. R. Rep. No. 1497, 89th Cong., 2d Sess., 10 (1966); S. Rep.

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[20] Respondents also argue that their need for the requested material is great and that it would be unfair to expect them to defend the litigation brought against them by Captain Hoover without access to it. We answered this argument in *Grolier*, noting that the fact that in particular litigation a party's particularized showing of need may on occasion justify discovery of privileged material in order to avoid unfairness does not mean that such material is routinely discoverable and hence outside the scope of Exemption 5. See 462 U. S., at 27-28. Respondents must make their claim of particularized need in their litigation with Captain Hoover, since it is not a claim under the FOIA.

[21] This difficulty is illustrated by the controversy surrounding the proposed provisions of the Federal Rules of Evidence governing privileges, which were rejected by Congress. See generally 2 J. Weinstein & M. Berger, Evidence ¶ 501[01] (1982).

No. 813, 89th Cong., 1st Sess., 9 (1965).[22] The *Machin* privilege was recognized for precisely this reason.[23] Thus, the *Machin* privilege is sufficiently related to the concerns expressed in the legislative history[24] that we cannot say that the legislative history demonstrates that the statute should not be construed to mean what it says with respect to the *Machin* privilege.[25]

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[22] Moreover, the Senate Report stated that Exemption 5 had been drafted in response to comments of federal agencies made in the course of Committee hearings, S. Rep. No. 813, at 4, 9. During those hearings, the Government submitted material indicating that the *Machin* privilege should be incorporated into the FOIA. See Administrative Procedure Act: Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 89th Cong., 1st Sess., 196, 206, 366–367, 418 (1965).

[23] "We agree with the Government that when disclosure of investigative reports obtained in large part through promises of confidentiality would hamper the efficient operation of an important Government program and perhaps even, as the Secretary here claims, impair the national security by weakening a branch of the military, the reports should be considered privileged." 114 U. S. App. D. C., at 338, 316 F. 2d, at 339.

It follows that recognition of the *Machin* privilege would not be inconsistent with the fundamental goals of the FOIA since it does not necessarily reduce the amount of information available to the public. The privilege is recognized because the Government would not be able to obtain the information but for its assurance of confidentiality. Thus, much if not all of the information covered by the *Machin* privilege would not find its way into the public realm even if we refused to recognize the privilege, since under those circumstances the information would not be obtained by the Government in the first place.

[24] Cf. *Federal Open Market Committee* v. *Merrill*, 443 U. S. 340, 357–360 (1979) (privilege for Federal Reserve's Open Market Committee's policy directives sufficiently analogous to privilege for confidential information concerning Government contracts mentioned in Exemption 5's legislative history to merit incorporation into Exemption 5).

[25] Respondents rely on the fact that in recent years Congress has several times failed to act on proposed legislation which would have codified the *Machin* privilege. However, this does not represent a rejection of the privilege. To the contrary, Congress has enacted Federal Rule of Evidence 501, which recognizes the power of the courts to fashion common-law

We therefore simply interpret Exemption 5 to mean what it says. The judgment of the Court of Appeals is

Reversed.

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rules of privilege. Congressional refusal to codify the *Machin* privilege hardly limits the power of courts to recognize the privilege under Rule 501. Indeed, Rule 501 was adopted precisely because Congress wished to leave privilege questions to the courts rather than attempt to codify them. See H. R. Rep. No. 93–650, p. 8 (1973); S. Rep. No. 93–1277, pp. 11, 13 (1974); *supra*, at 802–803, and n. 21. Congressional failure to codify this privilege is therefore irrelevant to our inquiry. Respondents also rely on legislation enacted after Exemption 5 concerning the scope of Exemption 3 and various other statutes. This legislation obviously sheds no light on the scope of Exemption 5.

UNITED STATES *v.* ARTHUR YOUNG & CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 82–687. Argued January 16, 1984—Decided March 21, 1984

Respondent certified public accountant firm, as the independent auditor for respondent corporation, was responsible for reviewing the corporation's financial statements as required by the federal securities laws. In the course of reviewing these statements, the accounting firm verified the corporation's statement of its contingent tax liabilities, and, in so doing, prepared tax accrual workpapers relating to the evaluation of the corporation's reserves for such liabilities. When a routine audit by the Internal Revenue Service (IRS) to determine the corporation's income tax liability for certain years revealed that the corporation had made questionable payments from a "special disbursement account," the IRS instituted a criminal investigation of the corporation's tax returns. In that process, the IRS, pursuant to § 7602 of the Internal Revenue Code of 1954—which authorizes the Secretary of the Treasury to summon and "examine any books, papers, records, or other data which may be relevant or material" to a particular tax inquiry—issued a summons to the accounting firm requiring it to make available to the IRS all of its files relating to the corporation, including its tax accrual workpapers. When the corporation instructed the accounting firm not to comply with the summons, the IRS commenced an enforcement action in Federal District Court, which, upon finding that the tax accrual workpapers were relevant to the IRS investigation within the meaning of § 7602 and refusing to recognize an accountant-client privilege that would protect the workpapers, ordered the summons enforced. The Court of Appeals affirmed in part and reversed in part. While agreeing that the workpapers were relevant to the IRS investigation, the court held that the public interest in promoting full disclosure to public accountants, and in turn ensuring the integrity of the securities markets, required protection under a work-product immunity doctrine for the work that independent auditors perform for publicly owned corporations. Accordingly, because it found that the IRS had not made a sufficient showing of need to overcome the immunity and was not seeking to prove fraud on the corporation's part, the court refused to enforce the summons insofar as it sought the tax accrual workpapers.

Held:

1. The tax accrual workpapers are relevant within the meaning of § 7602. As § 7602's language indicates, an IRS summons is not to be

judged by the relevance standards used in deciding whether to admit evidence in court. The language "may be" reflects Congress' intention to allow the IRS to obtain items of even *potential* relevance to the ongoing investigation, without reference to its admissibility. As a discovery tool, a § 7602 summons is critical to the IRS's investigative and enforcement functions. That the tax accrual workpapers are not actually used in the preparation of tax returns by the taxpayer or its accountants does not bar a finding of relevance within the meaning of § 7602. Pp. 813–815.

2. The tax accrual workpapers are not protected from disclosure under § 7602. Pp. 815–821.

(a) While § 7602 is subject to traditional privileges and limitations, any other restrictions upon the IRS summons power should be avoided "absent unambiguous directions from Congress." *United States* v. *Bisceglia*, 420 U. S. 141, 150. There are no such unambiguous directions that would justify a judicially created work-product immunity doctrine for tax accrual workpapers summoned under § 7602. Indeed, § 7602 reflects a congressional policy *favoring disclosure* of all information relevant to a legitimate IRS inquiry. Pp. 815–817.

(b) In light of *Couch* v. *United States*, 409 U. S. 322, which held that no confidential accountant-client privilege exists, the Court of Appeals' creation of a work-product privilege was misplaced and conflicts with Congress' clear intent. P. 817.

(c) Nor is a work-product immunity for accountants' tax accrual workpapers a fitting analogue to the attorney work-product doctrine. An independent certified public accountant performs a different role from an attorney whose duty, as his client's confidential adviser and advocate, is to present the client's case in the most favorable possible light. In certifying the public reports that depict a corporation's financial status, the accountant performs a *public* responsibility transcending any employment relationship with the client, and owes allegiance to the corporation's creditors and stockholders, as well as to the investing public. Pp. 817–818.

(d) The integrity of the securities markets will not suffer absent some protection for accountants' tax accrual workpapers. The independent auditor's obligation to serve the public interest assures that that integrity will be preserved, without the need for a work-product immunity for such workpapers. Pp. 818–819.

(e) Nor does enforcement of an IRS summons for accountants' tax accrual workpapers give the IRS an unfair advantage in negotiating and litigating tax controversies. Since the Securities and Exchange Commission or a private plaintiff in securities litigation would be entitled to obtain the tax accrual workpapers at issue, there is no good reason, in light of § 7602's broad congressional command, for conferring lesser authority upon the IRS. Pp. 820–821.

677 F. 2d 211, affirmed in part, reversed in part, and remanded.

BURGER, C. J., delivered the opinion for a unanimous Court.

Mark I. Levy argued the cause for the United States. With him on the briefs were *Solicitor General Lee, Assistant Attorney General Archer, Deputy Solicitor General Bator, Stuart A. Smith, Carleton D. Powell,* and *Kristina E. Harrigan.*

Carl D. Liggio argued the cause for respondent Arthur Young & Co. With him on the brief were *John E. Matson* and *Richard I. Janvey. William Eldred Jackson* argued the cause for respondent Amerada Hess Corp. With him on the brief were *Russell E. Brooks, John C. Maloney, Jr.,* and *Robert G. Morvillo.**

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to consider whether tax accrual workpapers prepared by a corporation's independent certified public accountant in the course of regular financial audits are protected from disclosure in response to an Internal Revenue Service summons issued under § 7602 of the Internal Revenue Code of 1954 (Code), 26 U. S. C. § 7602.

**E. Barrett Prettyman, Jr., Arnold C. Johnson, Walter A. Smith, Jr., William A. Wise,* and *Walter P. Zivley* filed a brief for El Paso Co. as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Institute of Certified Public Accountants by *Kenneth J. Bialkin* and *Louis A. Craco;* for Arthur Andersen & Co. et al. by *Eldon Olson, Victor M. Earle III, Donald Dreyfus, Harris J. Amhowitz,* and *Kenneth H. Lang;* for the Committee on Corporate Law Departments of the Association of the Bar of the City of New York by *David Lasky;* and for the Tax Executives Institute, Inc., by *Timothy J. McCormally.*

Stephen A. Bokat filed a brief for the Chamber of Commerce of the United States as *amicus curiae.*

I

A

Respondent Arthur Young & Co. is a firm of certified public accountants. As the independent auditor for respondent Amerada Hess Corp., Young is responsible for reviewing the financial statements prepared by Amerada as required by the federal securities laws.[1] In the course of its review of these financial statements, Young verified Amerada's statement of its contingent tax liabilities, and, in so doing, prepared the tax accrual workpapers at issue in this case. Tax accrual workpapers are documents and memoranda relating to Young's evaluation of Amerada's reserves for contingent tax liabilities. Such workpapers sometimes contain information pertaining to Amerada's financial transactions, identify questionable positions Amerada may have taken on its tax returns, and reflect Young's opinions regarding the validity of such positions. See *infra*, at 810–813.

In 1975 the Internal Revenue Service began a routine audit to determine Amerada's corporate income tax liability for the tax years 1972 through 1974. When the audit revealed that Amerada had made questionable payments of $7,830 from a "special disbursement account," the IRS instituted a criminal investigation of Amerada's tax returns as well. In that process, pursuant to Code § 7602, 26 U. S. C. § 7602,[2] the IRS

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[1] See, *e. g.*, Securities Exchange Act of 1934, §§ 12(b)(1)(J)–(L), 48 Stat. 892, as redesignated, 78 Stat. 565, 15 U. S. C. §§ 78*l*(b)(1)(J)–(L); Regulation S–X, 17 CFR § 210 *et seq.* (1983). See also n. 5, *infra*.

[2] Section 7602 of the Code, 26 U. S. C. § 7602, provides as follows:

"For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—

"(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

"(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, issued an administrative summons to Young, which required Young to make available to the IRS all its Amerada files, including its tax accrual workpapers. Amerada instructed Young not to comply with the summons.

The IRS then commenced this enforcement action against Young in the United States District Court for the Southern District of New York. See 26 U. S. C. § 7604.[3] Amerada intervened, as permitted by 26 U. S. C. § 7609(b)(1).[4] The District Court found that Young's tax accrual workpapers were relevant to the IRS investigation within the meaning of § 7602 and refused to recognize an accountant-client privilege that would protect the workpapers. 496 F. Supp. 1152, 1156–1157 (1980). Accordingly, the District Court ordered the summons enforced.

B

A divided United States Court of Appeals for the Second Circuit affirmed in part and reversed in part. 677 F. 2d 211

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custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

"(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry."

[3] Section 7604 of the Code, 26 U. S. C. § 7604, provides:

"If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data."

[4] The IRS summons served upon Young sought the production of records concerning the business transactions and affairs of Young's client, Amerada. Accordingly, under Code § 7609(a)(1), 26 U. S. C. § 7609(a)(1), Amerada was entitled to notice of the IRS summons. Section 7609(b)(1) provides that "any person who is entitled to notice of a summons under subsection (a) shall have the right to intervene in any proceeding with respect to the enforcement of such summons under section 7604."

(1982). The Court of Appeals majority agreed with the District Court that the tax accrual workpapers were relevant to the IRS investigation of Amerada, but held that the public interest in promoting full disclosure to public accountants, and in turn ensuring the integrity of the securities markets, required protection for the work that such independent auditors perform for publicly owned companies. Drawing upon *Hickman* v. *Taylor*, 329 U. S. 495 (1947), and Federal Rule of Civil Procedure 26(b)(3), the Court of Appeals fashioned a work-product immunity doctrine for tax accrual workpapers prepared by independent auditors in the course of compliance with the federal securities laws. Because the IRS had not demonstrated a sufficient showing of need to overcome the immunity and was not seeking to prove fraud on Amerada's part, the Court of Appeals refused to enforce the summons insofar as it sought Young's tax accrual workpapers.

One judge dissented from that portion of the majority opinion creating a work-product immunity for accountants' tax accrual workpapers. The dissent viewed the statutory summons authority, 26 U. S. C. § 7602, as reflecting a congressional decision in favor of the disclosure of such workpapers. The dissent also rejected the policy justifications asserted by the majority for an accountant work-product immunity, reasoning that such protection was not necessary to ensure the integrity of the independent auditor's certification of a corporation's financial statements.

We granted certiorari, 459 U. S. 1199 (1983). We affirm in part and reverse in part.

II

Corporate financial statements are one of the primary sources of information available to guide the decisions of the investing public. In an effort to control the accuracy of the financial data available to investors in the securities markets, various provisions of the federal securities laws require publicly held corporations to file their financial statements with the Securities and Exchange Commission.[5] Commission regulations stipulate that these financial reports must be audited by an independent certified public accountant in accordance with generally accepted auditing standards.[6] By examining the corporation's books and records, the independent auditor determines whether the financial reports of the corporation have been prepared in accordance with generally accepted accounting principles.[7] The auditor then issues an opinion as to whether the financial statements, taken as a whole, fairly present the financial position and operations of the corporation for the relevant period.[8] See n. 13, *infra.*

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[5] See Securities Act of 1933, Schedule A (25)–(27), 48 Stat. 88, 15 U. S. C. § 77aa (filing of audited financial statement prior to registration of new stock issue); Securities Exchange Act of 1934, §§ 12(b)(1)(J)–(L), 48 Stat. 892, as redesignated, 78 Stat. 565, 15 U. S. C. §§ 78*l*(b)(1)(J)–(L) (filing of audited financial statement prior to listing securities on an exchange); Securities Exchange Act of 1934, §§ 13(a)(2), 13(b), 48 Stat. 894, as amended, 15 U. S. C. §§ 78m(a)(2), 78m(b); 17 CFR §§ 249.310, 249.460 (1983) (filing of annual reports); Securities Exchange Act of 1934, § 14, 48 Stat. 895, as amended, 15 U. S. C. § 78n; Schedule 14A, Item 15, 17 CFR § 240.14a–101 (1983) (filing of audited financial statement in connection with proxy and information statements).

[6] Regulation S–X, 17 CFR § 210 *et seq.* (1983), prescribes the qualifications of accountants and the contents of the accountants' reports that must be submitted with corporate financial statements. In particular, 17 CFR § 210.1–02(d) (1983) requires that the financial statements of a public corporation must be audited by an accountant "in accordance with generally accepted auditing standards." "Generally accepted auditing standards" are promulgated by a committee of the public accounting profession's national organization, the American Institute of Certified Public Accountants (AICPA). See 1 AICPA Professional Standards (CCH) § 150.02 (1972).

[7] See 1 AICPA, Statement on Auditing Standards § 110.01 (1972). Promulgated by the accounting profession's Financial Accounting Standards Board, "generally accepted accounting principles" are the conventions, rules, and procedures that define accepted accounting practices. See W. Meigs, E. Larsen, & R. Meigs, Principles of Auditing 25–26 (5th ed. 1973); H. Stettler, Auditing Principles 12–16 (5th ed. 1982).

[8] See 1 AICPA Professional Standards (CCH) § 509 (1974).

An important aspect of the auditor's function is to evaluate the adequacy and reasonableness of the corporation's reserve account for contingent tax liabilities. This reserve account, known as the tax accrual account, the noncurrent tax account, or the tax pool, represents the amount set aside by the corporation to cover adjustments and additions to the corporation's actual tax liability. Additional corporate tax liability may arise from a wide variety of transactions.[9] The presence of a reserve account for such contingent tax liabilities reflects the corporation's awareness of, and preparedness for, the possibility of an assessment of additional taxes.

The independent auditor draws upon many sources in evaluating the sufficiency of the corporation's tax accrual account. Initially, the corporation's books, records, and tax returns must be analyzed in light of the relevant Code provisions, Treasury Regulations, Revenue Rulings, and case law. The auditor will also obtain and assess the opinions, speculations, and projections of management with regard to unclear, aggressive, or questionable tax positions that may have been taken on prior tax returns. In exploring the tax consequences of certain transactions, the auditor often engages in a "worst-case" analysis in order to ensure that the tax accrual account accurately reflects the full extent of the corporation's exposure to additional tax liability. From this conglomeration of data, the auditor is able to estimate the potential cost of each particular contingency, as well as the probability that the additional liability may arise.

The auditor's tax accrual workpapers record this process of examination and analysis. Such workpapers may document the auditor's interviews with corporate personnel, judgments on questions of potential tax liability, and suggestions for alternative treatments of certain transactions for tax purposes. Tax accrual workpapers also contain an overall evaluation of the sufficiency of the corporation's reserve for contingent tax liabilities, including an item-by-item analysis of the corporation's potential exposure to additional liability. In short, tax accrual workpapers pinpoint the "soft spots" on a corporation's tax return by highlighting those areas in which the corporate taxpayer has taken a position that may, at some later date, require the payment of additional taxes.

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[9] For example, the characterization of the proceeds of a sale as capital gain instead of ordinary income, the claiming of an investment tax credit, and the attribution of a transaction to a future tax year are decisions requiring judgment calls in gray areas of the Code, any one of which might result in a recomputation of the corporation's outstanding tax liability.

III

In seeking access to Young's tax accrual workpapers, the IRS exercised the summons power conferred by Code § 7602, 26 U. S. C. § 7602, which authorizes the Secretary of the Treasury to summon and "examine any books, papers, records, or other data which may be relevant or material" to a particular tax inquiry.[10] The District Court and the Court of Appeals determined that the tax accrual workpapers at issue in this case satisfied the relevance requirement of § 7602, because they "might have thrown light upon" the correctness of Amerada's tax return.[11] Because the relevance of tax accrual workpapers is a logical predicate to the question whether such workpapers should be protected by some form of work-product immunity, we turn first to an evaluation of the relevance issue.[12] We agree that such workpapers are relevant within the meaning of § 7602.

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[10] In *United States* v. *Powell*, 379 U. S. 48 (1964), the Court refused to impose a probable-cause requirement in connection with the enforcement of an IRS summons under § 7602. Instead, the Court held that the IRS need show only "that the investigation will be conducted pursuant to a legitimate purpose, *that the inquiry may be relevant to the purpose*, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed . . . ." *Id.*, at 57–58 (emphasis added).

[11] The relevance standard employed by the Second Circuit—whether the documents at issue "might have thrown light upon the correctness of the return"—appears to be widely accepted among the Courts of Appeals. See, *e. g.*, *United States* v. *Wyatt*, 637 F. 2d 293, 300 (CA5 1981); *United States* v. *Turner*, 480 F. 2d 272, 279 (CA7 1973); *United States* v. *Ryan*, 455 F. 2d 728, 733 (CA9 1972); *United States* v. *Egenberg*, 443 F. 2d 512, 515–516 (CA3 1971); *Foster* v. *United States*, 265 F. 2d 183, 187 (CA2), cert. denied, 360 U. S. 912 (1959). In *United States* v. *Harrington*, 388 F. 2d 520, 524 (1968), the Second Circuit amplified this test by stating that

As the language of § 7602 clearly indicates, an IRS summons is not to be judged by the relevance standards used in deciding whether to admit evidence in federal court. Cf. Fed. Rule Evid. 401. The language "may be" reflects Congress' express intention to allow the IRS to obtain items of even *potential* relevance to an ongoing investigation, without reference to its admissibility. The purpose of Congress is obvious: the Service can hardly be expected to know whether such data will in fact be relevant until they are procured and scrutinized. As a tool of discovery, the § 7602 summons is critical to the investigative and enforcement functions of the IRS, see *United States* v. *Powell*, 379 U. S. 48, 57 (1964); the Service therefore should not be required to establish that the documents it seeks are actually relevant in any technical, evidentiary sense.

"the 'might' in the articulated standard, 'might throw light upon the correctness of the return,' is . . . an indication of a realistic expectation rather than an idle hope that something may be discovered." But in *United States* v. *Coopers & Lybrand*, 550 F. 2d 615 (1977), the Court of Appeals for the Tenth Circuit held that tax accrual workpapers not prepared in connection with the filing of a corporate tax return were not relevant within the meaning of § 7602.

[12] The petition for certiorari did not question the relevancy of the tax accrual workpapers, and respondents have not filed a cross-petition raising the issue. Respondents have, however, argued before this Court that the Court of Appeals erred in holding that Young's tax accrual workpapers were relevant to the IRS investigation of Amerada within the meaning of § 7602. Respondents were clearly entitled to do so, for our precedents establish that a prevailing party may urge any ground in support of the judgment, whether or not that ground was relied upon or even considered by the court below. See, *e. g.*, *United States* v. *New York Telephone Co.*, 434 U. S. 159, 166, n. 8 (1977); *Dandridge* v. *Williams*, 397 U. S. 471, 475–476, n. 6 (1970).

That tax accrual workpapers are not actually used in the preparation of tax returns by the taxpayer or its own accountants does not bar a finding of relevance within the meaning of § 7602. The filing of a corporate tax return entails much more than filling in the blanks on an IRS form in accordance with undisputed tax principles; more likely than not, the return is a composite interpretation of corporate transactions made by corporate officers in the light most favorable to the taxpayer. It is the responsibility of the IRS to determine whether the corporate taxpayer in completing its return has stretched a particular tax concept beyond what is allowed. Records that illuminate any aspect of the return—such as the tax accrual workpapers at issue in this case—are therefore highly relevant to legitimate IRS inquiry. The Court of Appeals acknowledged this: "It is difficult to say that the assessment by the independent auditor of the correctness of positions taken by the taxpayer in his return would not throw 'light upon' the correctness of the return." 677 F. 2d, at 219. We accordingly affirm the Court of Appeals' holding that Young's tax accrual workpapers are relevant to the IRS investigation of Amerada's tax liability.

IV

A

We now turn to consider whether tax accrual workpapers prepared by an independent auditor in the course of a routine review of corporate financial statements should be protected by some form of work-product immunity from disclosure under § 7602. Based upon its evaluation of the competing policies of the federal tax and securities laws, the Court of Appeals found it necessary to create a so-called privilege for the independent auditor's workpapers.

Our complex and comprehensive system of federal taxation, relying as it does upon self-assessment and reporting, demands that all taxpayers be forthright in the disclosure of relevant information to the taxing authorities. Without such disclosure, and the concomitant power of the Government to compel disclosure, our national tax burden would not be fairly and equitably distributed. In order to encourage effective tax investigations, Congress has endowed the IRS with expansive information-gathering authority; § 7602 is the centerpiece of that congressional design. As we noted in *United States* v. *Bisceglia*, 420 U. S. 141, 146 (1975):

> "The purpose of [§ 7602] is not to accuse, but to inquire. Although such investigations unquestionably involve some invasion of privacy, they are essential to our self-reporting system, and the alternatives could well involve far less agreeable invasions of house, business, and records."

Similarly, we noted in *United States* v. *Euge*, 444 U. S. 707, 711 (1980):

> "[T]his Court has consistently construed congressional intent to require that if the summons authority claimed is necessary for the effective performance of congressionally imposed responsibilities to enforce the tax Code, that authority should be upheld absent express statutory prohibition or substantial countervailing policies."

While § 7602 is "subject to the traditional privileges and limitations," *id.*, at 714, any other restrictions upon the IRS summons power should be avoided "absent unambiguous directions from Congress." *United States* v. *Bisceglia*, *supra*, at 150. We are unable to discern the sort of "unambiguous directions from Congress" that would justify a judicially created work-product immunity for tax accrual workpapers summoned under § 7602. Indeed, the very language of § 7602 reflects precisely the opposite: a congressional policy choice *in favor of disclosure* of all information relevant to a legitimate IRS inquiry. In light of this explicit statement by the Legislative Branch, courts should be chary in recognizing exceptions to the broad summons authority of the IRS or in fashioning new privileges that would curtail disclosure under

§ 7602. Cf. *Milwaukee* v. *Illinois*, 451 U. S. 304, 315 (1981). If the broad latitude granted to the IRS by § 7602 is to be circumscribed, that is a choice for Congress, and not this Court, to make. See *United States* v. *Euge*, 444 U. S., at 712.

B

The Court of Appeals nevertheless concluded that "substantial countervailing policies," *id.*, at 711, required the fashioning of a work-product immunity for an independent auditor's tax accrual workpapers. To the extent that the Court of Appeals, in its concern for the "chilling effect" of the disclosure of tax accrual workpapers, sought to facilitate communication between independent auditors and their clients, its remedy more closely resembles a testimonial accountant-client privilege than a work-product immunity for accountants' workpapers. But as this Court stated in *Couch* v. *United States*, 409 U. S. 322, 335 (1973), "no confidential accountant-client privilege exists under federal law, and no state-created privilege has been recognized in federal cases." In light of *Couch*, the Court of Appeals' effort to foster candid communication between accountant and client by creating a self-styled work-product privilege was misplaced, and conflicts with what we see as the clear intent of Congress.

Nor do we find persuasive the argument that a work-product immunity for accountants' tax accrual workpapers is a fitting analogue to the attorney work-product doctrine established in *Hickman* v. *Taylor*, 329 U. S. 495 (1947). The *Hickman* work-product doctrine was founded upon the private attorney's role as the client's confidential adviser and advocate, a loyal representative whose duty it is to present the client's case in the most favorable possible light. An independent certified public accountant performs a different role. By certifying the public reports that collectively depict a corporation's financial status, the independent auditor assumes a *public* responsibility transcending any employment relationship with the client. The independent public accountant performing this special function owes ultimate allegiance to the corporation's creditors and stockholders, as well as to the investing public. This "public watchdog" function demands that the accountant maintain total independence from the client at all times and requires complete fidelity to the public trust. To insulate from disclosure a certified public accountant's interpretations of the client's financial statements would be to ignore the significance of the accountant's role as a disinterested analyst charged with public obligations.

We cannot accept the view that the integrity of the securities markets will suffer absent some protection for accountants' tax accrual workpapers. The Court of Appeals apparently feared that, were the IRS to have access to tax accrual workpapers, a corporation might be tempted to withhold from its auditor certain information relevant and material to a proper evaluation of its financial statements. But the independent certified public accountant cannot be content with the corporation's representations that its tax accrual reserves are adequate; the auditor is ethically and professionally obligated to ascertain for himself as far as possible whether the corporation's contingent tax liabilities have been accurately stated. If the auditor were convinced that the scope of the examination had been limited by management's reluctance to disclose matters relating to the tax accrual reserves, the auditor would be unable to issue an unqualified opinion as to the accuracy of the corporation's financial statements. Instead, the auditor would be required to issue a qualified opinion, an adverse opinion, or a disclaimer of opinion, thereby notifying the investing public of possible potential problems inherent in the corporation's financial reports.[13]

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[13] An *unqualified opinion,* the most favorable report an auditor may give, represents the auditor's finding that the company's financial statements fairly present the financial position of the company, the results of its operations, and the changes in its financial position for the period under audit, in conformity with consistently applied generally accepted account-

Responsible corporate management would not risk a qualified evaluation of a corporate taxpayer's financial posture to afford cover for questionable positions reflected in a prior tax return.[14] Thus, the independent auditor's obligation to serve the public interest assures that the integrity of the securities markets will be preserved, without the need for a work-product immunity for accountants' tax accrual workpapers.[15]

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ing principles. See 1 AICPA, Statement on Auditing Standards §§ 510, 511.01 (1973). Alternatively, the auditor may give a *qualified opinion*, which states that the financial statements are fairly presented except for, or subject to, a departure from generally accepted accounting principles, a change in accounting principles, or a material uncertainty. *Id.*, § 512. An *adverse opinion* is a reflection of the auditor's determination that the corporation's financial statements do not fairly present the financial position, results of operations, or changes in financial position of the company in conformity with generally accepted accounting principles; an adverse opinion is issued when the auditor determines that the corporation has materially misstated certain items on its financial statements. *Id.*, § 513. Finally, a *disclaimer of opinion* expresses the auditor's inability to draw a conclusion as to the accuracy of the corporate financial records. A disclaimer of opinion is generally issued when the auditor lacks sufficient information about the financial records to issue an overall opinion. *Id.*, § 514. See generally A. Arens & J. Loebbecke, Auditing: An Integrated Approach 643–660 (1976).

[14] The inclusion in an audited financial statement of anything less than an unqualified opinion could send signals to stockholders, creditors, potential investors, and others that the independent auditor has been unable to give the corporation an unqualified bill of financial health. Such a public auditor's opinion could well have serious consequences for the corporation and its shareholders.

[15] Indeed, rather than protecting the investing public by ensuring the accuracy of corporate financial records, insulation of tax accrual workpapers from disclosure might well undermine the public's confidence in the independent auditing process. The SEC requires the filing of audited financial statements in order to obviate the fear of loss from reliance on inaccurate information, thereby encouraging public investment in the Nation's industries. It is therefore not enough that financial statements *be* accurate; the public must also *perceive* them as being accurate. Public faith in the reliability of a corporation's financial statements depends upon the public perception of the outside auditor as an independent professional. Endowing

We also reject respondents' position that fundamental fairness precludes IRS access to accountants' tax accrual workpapers. Respondents urge that the enforcement of an IRS summons for accountants' tax accrual workpapers permits the Government to probe the thought processes of its taxpayer citizens, thereby giving the IRS an unfair advantage in negotiating and litigating tax controversies. But if the SEC itself, or a private plaintiff in securities litigation, sought to obtain the tax accrual workpapers at issue in this case, they would surely be entitled to do so.[16] In light of the broad congressional command of § 7602, no sound reason exists for conferring lesser authority upon the IRS than upon a private litigant suing with regard to transactions concerning which the public has no interest.

Congress has granted to the IRS "broad latitude to adopt enforcement techniques helpful in the performance of [its] tax collection and assessment responsibilities." *United States* v. *Euge*, 444 U. S., at 716, n. 9. Recognizing the intrusiveness of demands for the production of tax accrual workpapers, the IRS has demonstrated administrative sensitivity to the concerns expressed by the accounting profession by tightening its internal requirements for the issuance of such summonses.

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the workpapers of an independent auditor with a work-product immunity would destroy the appearance of auditor's independence by creating the impression that the auditor is an advocate for the client. If investors were to view the auditor as an advocate for the corporate client, the value of the audit function itself might well be lost. See generally Arens & Loebbecke, *supra*, at 55–58.

[16] See, *e. g.*, Securities Act of 1933, § 19, 48 Stat. 85, 15 U. S. C. § 77s(b) (for purposes of all "necessary and proper" investigations, SEC is empowered to "require the production of any books, papers, or other documents which the Commission deems relevant or material to the inquiry"); Securities Exchange Act of 1934, § 21, 48 Stat. 899, 15 U. S. C. § 78u(b) (same); Fed. Rule Civ. Proc. 26(b)(1) (parties may obtain discovery of "any matter, not privileged, which is relevant to the subject matter involved in the pending action").

See Internal Revenue Manual § 4024.4 (CCH 1981).[17] Although these IRS guidelines were not applicable during the years at issue in this case, their promulgation further refutes respondents' fairness argument and reflects an administrative flexibility that reinforces our decision not to reduce irrevocably the § 7602 summons power.

V

Beyond question it is desirable and in the public interest to encourage full disclosures by corporate clients to their independent accountants; if it is necessary to balance competing interests, however, the need of the Government for full disclosure of all information relevant to tax liability must also weigh in that balance. This kind of policy choice is best left to the Legislative Branch. Accordingly, the judgment of the Court of Appeals is affirmed in part and reversed in part, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

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[17] The new IRS guidelines provide that access may be had to accountants' tax accrual workpapers only in "unusual circumstances" and only as a "collateral source for factual data." The guidelines require the prior written approval of the Chief of the Examination Division of the IRS before an examining agent may request tax accrual workpapers; in addition, they state that the examiner should first take all reasonable means to secure the information from the corporation itself before issuing a summons to the independent auditor.

NATIONAL LABOR RELATIONS BOARD *v.* CITY DISPOSAL SYSTEMS, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 82-960. Argued November 7, 1983—Decided March 21, 1984

Section 7 of the National Labor Relations Act provides that employees shall have the right to join or assist labor organizations, to bargain collectively, and "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." The collective-bargaining agreement between respondent and the union representing its truckdrivers provides that respondent shall not require employees to operate any vehicle that is not in safe operating condition, and that "[i]t shall not be a violation of this Agreement where employees refuse to operate such equipment unless such refusal is unjustified." One of respondent's employees (James Brown) was discharged when he refused to drive a truck that he honestly and reasonably believed to be unsafe because of faulty brakes. After the union declined to process Brown's grievance under the bargaining agreement, he filed an unfair labor practice charge with the National Labor Relations Board (NLRB), challenging his discharge. An Administrative Law Judge concluded that, even though Brown acted alone in asserting a contractual right, his refusal to operate the truck constituted "concerted activit[y]" protected by § 7, and that respondent had therefore committed an unfair labor practice in discharging him. The NLRB adopted the Administrative Law Judge's findings and conclusions and ordered Brown's reinstatement with backpay, applying its longstanding "*Interboro* doctrine," which was based on the conclusions that an individual's reasonable and honest assertion of a right contained in a collective-bargaining agreement is an extension of the concerted action that produced the agreement, and that the assertion of such a right affects the rights of all employees covered by the agreement. However, the Court of Appeals denied enforcement of the NLRB's order, finding that Brown's refusal to drive the truck was an action taken solely on his own behalf and thus was not a concerted activity within § 7's meaning.

Held:

1. The NLRB's *Interboro* doctrine is a reasonable interpretation of the Act. Pp. 829-839.

(a) The language of § 7 does not confine itself to situations where two or more employees are working together at the same time and the same place toward a common goal, or to situations where a lone employee intends to induce group activity or acts as a representative of at least one other employee. The invocation of a right rooted in a collective-bargaining agreement is unquestionably an integral part of the process that gave rise to the agreement. The *Interboro* doctrine is entirely consistent with the Act's purposes, which include the encouragement of collective bargaining and other practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions. Moreover, § 7's general history reveals no inconsistency between the *Interboro* doctrine and congressional intent to equalize the bargaining power of management and labor. As long as the employee's statement or action is based on a reasonable and honest belief that he is being, or has been, asked to perform a task that he is not required to perform under his collective-bargaining agreement, and the statement or action is reasonably directed toward the enforcement of a collectively bargained right, there is no justification for overturning the NLRB's judgment that the employee is engaged in concerted activity. Pp. 830–837.

(b) The fact that an activity is concerted does not necessarily mean that an employee may engage in the activity with impunity. If an employee engages in concerted activity in a manner that is overly abusive or violative of his collective-bargaining agreement, his actions would be unprotected. P. 837.

(c) There is no merit to the argument that the *Interboro* doctrine undermines the arbitration process by providing employees with the possibility of provoking a discharge and then filing an unfair labor practice claim. An employee who purposefully follows this route would run the risk that the NLRB would find his actions concerted but nonetheless unprotected. More importantly, to the extent that the factual issues raised in an unfair labor practice action have been, or can be, addressed through the grievance process, the NLRB may defer to that process. Pp. 837–839.

2. The NLRB reasonably concluded that Brown's honest and reasonable assertion of his right to be free of the obligation to drive unsafe trucks, even though he did not explicitly refer to the collective-bargaining agreement when he refused to drive the truck, constituted concerted activity within the meaning of § 7. As long as the nature of the employee's complaint is reasonably clear to the person to whom it is communicated, and the complaint in fact refers to a reasonably perceived violation of the collective-bargaining agreement, the complaining employee is engaged in the process of enforcing that agreement. Respondent's argument that the NLRB erred in finding Brown's action concerted based only on Brown's reasonable and honest belief that the truck was

unsafe, because the bargaining agreement required that the truck be objectively unsafe, confuses the threshold question whether Brown's conduct was concerted with the ultimate question whether that conduct was protected. The latter question should be considered on remand. Pp. 839–841.

683 F. 2d 1005, reversed and remanded.

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which BURGER, C. J., and POWELL and REHNQUIST, JJ., joined, *post*, p. 841.

Norton J. Come argued the cause for petitioner. With him on the briefs were *Solicitor General Lee, Deputy Solicitor General Wallace, Carter G. Phillips, Linda Sher,* and *Elinor Hadley Stillman.*

Robert P. Ufer argued the cause for respondent. With him on the brief were *Thomas G. Kienbaum* and *Theodore R. Opperwall.**

JUSTICE BRENNAN delivered the opinion of the Court.

James Brown, a truckdriver employed by respondent, was discharged when he refused to drive a truck that he honestly and reasonably believed to be unsafe because of faulty brakes. Article XXI of the collective-bargaining agreement between respondent and Local 247 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, which covered Brown, provides:

> "The Employer shall not require employees to take out on the streets or highways any vehicle that is not in safe operating condition or equipped with the safety appli-

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*Briefs of *amici curiae* urging reversal were filed for the American Federation of Labor and Congress of Industrial Organizations by *J. Albert Woll, Laurence Gold,* and *George Kaufmann;* and for Teamsters for a Democratic Union by *Paul Alan Levy* and *Alan B. Morrison.*

Briefs of *amici curiae* urging affirmance were filed for the Chamber of Commerce of the United States by *Edward B. Miller* and *Stephen A. Bokat;* for the Legal Foundation of America by *David Crump;* and for Roadway Express, Inc., by *Michael C. Towers* and *Mark E. Edwards.*

> ances prescribed by law. It shall not be a violation of this Agreement where employees refuse to operate such equipment unless such refusal is unjustified."[1]

The question to be decided is whether Brown's honest and reasonable assertion of his right to be free of the obligation to drive unsafe trucks constituted "concerted activit[y]" within the meaning of § 7 of the National Labor Relations Act (NLRA or Act), 61 Stat. 140, 29 U. S. C. § 157.[2] The National Labor Relations Board (NLRB or Board) held that Brown's refusal was concerted activity within § 7, and that his discharge was, therefore, an unfair labor practice under § 8(a)(1) of the Act, 61 Stat. 140, 29 U. S. C. § 158(a).[3] 256 N. L. R. B. 451 (1981). The Court of Appeals disagreed and declined enforcement. 683 F. 2d 1005 (CA6 1982). At least three other Courts of Appeals, however, have accepted the Board's interpretation of "concerted activities" as including the assertion by an individual employee of a right grounded in a collective-bargaining agreement.[4] We granted certiorari to resolve the conflict, 460 U. S. 1050 (1983), and now reverse.

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[1] App. 64. Article XXI also provides that "[t]he Employer shall not ask or require any employee to take out equipment that has been reported by any other employee as being in an unsafe operating condition until same has been approved as being safe by the mechanical department."

[2] Section 7 provides:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 61 Stat. 140.

[3] Section 8(a)(1) of the NLRA provides:

"It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." 61 Stat. 140.

[4] See, *e. g., NLRB* v. *Ben Pekin Corp.*, 452 F. 2d 205 (CA7 1971); *NLRB* v. *Selwyn Shoe Manufacturing Corp.*, 428 F. 2d 217, 221 (CA8 1970); *NLRB* v. *Interboro Contractors, Inc.*, 388 F. 2d 495 (CA2 1967). At least four Circuits share the position of the Sixth Circuit on this question. See, *e. g., Royal Development Co., Ltd.* v. *NLRB*, 703 F. 2d 363, 374 (CA9 1983); *Roadway Express, Inc.* v. *NLRB*, 700 F. 2d 687, 693–694

I

The facts are not in dispute in the current posture of this case.[5] Respondent, City Disposal Systems, Inc. (City Disposal), hauls garbage for the city of Detroit. Under the collective-bargaining agreement with Local Union No. 247, respondent's truckdrivers haul garbage from Detroit to a landfill about 37 miles away. Each driver is assigned to operate a particular truck, which he or she operates each day of work, unless that truck is in disrepair.

James Brown was assigned to truck No. 245. On Saturday, May 12, 1979, Brown observed that a fellow driver had difficulty with the brakes of another truck, truck No. 244. As a result of the brake problem, truck No. 244 nearly collided with Brown's truck. After unloading their garbage at the landfill, Brown and the driver of truck No. 244 brought No. 244 to respondent's truck-repair facility, where they were told that the brakes would be repaired either over the weekend or in the morning of Monday, May 14.

Early in the morning of Monday, May 14, while transporting a load of garbage to the landfill, Brown experienced difficulty with one of the wheels of his own truck—No. 245—and brought that truck in for repair. At the repair facility,

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(CA11 1983); *NLRB* v. *Buddies Supermarkets, Inc.*, 481 F. 2d 714 (CA5 1973) (dictum); *NLRB* v. *Northern Metal Co.*, 440 F. 2d 881 (CA3 1971). See also *Kohls* v. *NLRB*, 203 U. S. App. D. C. 139, 142–143, 629 F. 2d 173, 176–177 (1980) (expressing doubt about the validity of the *Interboro* doctrine). In *Roadway Express, Inc.* v. *NLRB*, 532 F. 2d 751 (1976), the Fourth Circuit enforced, without opinion, a decision of the Board applying the *Interboro* doctrine, *Roadway Express, Inc.*, 217 N. L. R. B. 278 (1975), but in *Krispy Kreme Doughnut Corp.* v. *NLRB*, 635 F. 2d 304, 308–310 (1980), the court indicated that it remained an open issue whether the *Interboro* doctrine would be followed in that Circuit.

[5] Respondent argued below that the Board erred in concluding that James Brown was motivated by an honest belief in the factual validity of his claim. That issue, however, is not before us.

Brown was told that, because of a backlog at the facility, No. 245 could not be repaired that day. Brown reported the situation to his supervisor, Otto Jasmund, who ordered Brown to punch out and go home. Before Brown could leave, however, Jasmund changed his mind and asked Brown to drive truck No. 244 instead. Brown refused, explaining that "there's something wrong with that truck. . . . [S]omething was wrong with the brakes . . . there was a grease seal or something leaking causing it to be affecting the brakes." Brown did not, however, explicitly refer to Article XXI of the collective-bargaining agreement or to the agreement in general. In response to Brown's refusal to drive truck No. 244, Jasmund angrily told Brown to go home. At that point, an argument ensued and Robert Madary, another supervisor, intervened, repeating Jasmund's request that Brown drive truck No. 244. Again, Brown refused, explaining that No. 244 "has got problems and I don't want to drive it." Madary replied that half the trucks had problems and that if respondent tried to fix all of them it would be unable to do business. He went on to tell Brown that "[w]e've got all this garbage out here to haul and you tell me about you don't want to drive." Brown responded, "Bob, what you going to do, put the garbage ahead of the safety of the men?" Finally, Madary went to his office and Brown went home. Later that day, Brown received word that he had been discharged. He immediately returned to work in an attempt to gain reinstatement but was unsuccessful.

On May 15, the day after the discharge, Brown filed a written grievance, pursuant to the collective-bargaining agreement, asserting that truck No. 244 was defective, that it had been improper for him to have been ordered to drive the truck, and that his discharge was therefore also improper. The union, however, found no objective merit in the grievance and declined to process it.

On September 7, 1979, Brown filed an unfair labor practice charge with the NLRB, challenging his discharge. The Administrative Law Judge (ALJ) found that Brown had been discharged for refusing to operate truck No. 244, that Brown's refusal was covered by § 7 of the NLRA, and that respondent had therefore committed an unfair labor practice under § 8(a)(1) of the Act. The ALJ held that an employee who acts alone in asserting a contractual right can nevertheless be engaged in concerted activity within the meaning of § 7:

> "'[W]hen an employee makes complaints concerning safety matters which are embodied in a contract, he is acting not only in his own interest, but is attempting to enforce such contract provisions in the interest of all the employees covered under that contract. Such activity we have found to be concerted and protected under the Act, and the discharge of an individual for engaging in such activity to be in violation of Section 8(a)(1) [of the Act].'" 256 N. L. R. B., at 454 (quoting *Roadway Express, Inc.*, 217 N. L. R. B. 278, 279 (1975)).

The NLRB adopted the findings and conclusions of the ALJ and ordered that Brown be reinstated with backpay.

On a petition for enforcement of the Board's order, the Court of Appeals disagreed with the ALJ and the Board. Finding that Brown's refusal to drive truck No. 244 was an action taken solely on his own behalf, the Court of Appeals concluded that the refusal was not a concerted activity within the meaning of § 7. This holding followed the court's prior decision in *ARO, Inc.* v. *NLRB*, 596 F. 2d 713 (CA6 1979), in which the Court of Appeals had held:

> "For an individual claim or complaint to amount to concerted action under the Act it must not have been made solely on behalf of an individual employee, but it must be made on behalf of other employees or at least be made with the object of inducing or preparing for group action and have some arguable basis in the collective bargaining agreement." *Id.*, at 718.

II

Section 7 of the NLRA provides that "[e]mployees shall have the right to . . . join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U. S. C. § 157. The NLRB's decision in this case applied the Board's longstanding "*Interboro* doctrine," under which an individual's assertion of a right grounded in a collective-bargaining agreement is recognized as "concerted activit[y]" and therefore accorded the protection of § 7.[6] See *Interboro Contractors, Inc.*, 157 N. L. R. B. 1295, 1298 (1966), enf'd, 388 F. 2d 495 (CA2 1967); *Bunney Bros. Construction Co.*, 139 N. L. R. B. 1516, 1519 (1962). The Board has relied on two justifications for the doctrine: First, the assertion of a right contained in a collective-bargaining agreement is an extension of the concerted action that produced the agreement, *Bunney Bros. Construction, supra*, at 1519; and second, the assertion of such a right affects the rights of all employees covered by the collective-bargaining agreement. *Interboro Contractors, supra*, at 1298.

We have often reaffirmed that the task of defining the scope of § 7 "is for the Board to perform in the first instance as it considers the wide variety of cases that come before it," *Eastex, Inc.* v. *NLRB*, 437 U. S. 556, 568 (1978), and, on an issue that implicates its expertise in labor relations, a reasonable construction by the Board is entitled to considerable deference, *NLRB* v. *Iron Workers*, 434 U. S. 335, 350 (1978);

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[6] The NLRB has recently held that, where a group of employees are not unionized and there is no collective-bargaining agreement, an employee's assertion of a right that can only be presumed to be of interest to other employees is not concerted activity. *Meyers Industries, Inc.*, 268 N. L. R. B. 493 (1984). The Board, however, distinguished that case from the cases involving the *Interboro* doctrine, which is based on the existence of a collective-bargaining agreement. The *Meyers* case is thus of no relevance here.

NLRB v. *Hearst Publications, Inc.*, 322 U. S. 111, 130–131 (1944). The question for decision today is thus narrowed to whether the Board's application of § 7 to Brown's refusal to drive truck No. 244 is reasonable.[7] Several reasons persuade us that it is.

A

Neither the Court of Appeals nor respondent appears to question that an employee's invocation of a right derived from a collective-bargaining agreement meets § 7's requirement that an employee's action be taken "for purposes of collective bargaining or other mutual aid or protection." As the Board first explained in the *Interboro* case, a single employee's invocation of such rights affects all the employees that are covered by the collective-bargaining agreement. *Interboro Contractors, Inc.*, *supra*, at 1298. This type of generalized effect, as our cases have demonstrated, is sufficient to bring the actions of an individual employee within the "mutual aid or protection" standard, regardless of whether the employee has his own interests most immediately in mind. See, *e. g.*, *NLRB* v. *J. Weingarten, Inc.*, 420 U. S. 251, 260–261 (1975).

The term "concerted activit[y]" is not defined in the Act but it clearly enough embraces the activities of employees who have joined together in order to achieve common goals. See, *e. g.*, *Meyers Industries, Inc.*, 268 N. L. R. B. 493, 494–495 (1984). What is not self-evident from the language of the Act, however, and what we must elucidate, is the precise manner in which particular actions of an individual employee must be linked to the actions of fellow employees in order to permit it to be said that the individual is engaged in concerted activity. We now turn to consider the Board's analysis of that question as expressed in the *Interboro* doctrine.

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[7] Respondent argues that because "the scope of the 'concerted activities' clause in Section 7 is essentially a jurisdictional or legal question concerning the coverage of the Act," we need not defer to the expertise of the Board. Brief for Respondent 13. We have never, however, held that such an exception exists to the normal standard of review of Board interpretations of the Act; indeed, we have not hesitated to defer to the Board's interpretation of the Act in the context of issues substantially similar to that presented here. *E. g.*, *NLRB* v. *J. Weingarten, Inc.*, 420 U. S. 251, 266–267 (1975) (right under § 7 to have union representative present at investigatory interview of employee). See also *Bayside Enterprises, Inc.* v. *NLRB*, 429 U. S. 298, 302–303 (1977) (definition of agricultural workers).

Although one could interpret the phrase, "to engage in other concerted activities," to refer to a situation in which two or more employees are working together at the same time and the same place toward a common goal, the language of § 7 does not confine itself to such a narrow meaning. In fact, § 7 itself defines both joining and assisting labor organizations—activities in which a single employee can engage—as concerted activities.[8] Indeed, even the courts that have rejected the *Interboro* doctrine recognize the possibility that an individual employee may be engaged in concerted activity when he acts alone. They have limited their recognition of this type of concerted activity, however, to two situations: (1) that in which the lone employee intends to induce group activity, and (2) that in which the employee acts as a representative of at least one other employee. See, *e. g., ARO, Inc.* v. *NLRB*, 596 F. 2d, at 717; *NLRB* v. *Northern Metal Co.*, 440 F. 2d 881, 884 (CA3 1971). The disagreement over the *Interboro* doctrine, therefore, merely reflects differing views regarding the nature of the relationship that must exist between the action of the individual employee and the actions of the group in order for § 7 to apply. We cannot say that the Board's view of that relationship, as applied in the *Interboro* doctrine, is unreasonable.

The invocation of a right rooted in a collective-bargaining agreement is unquestionably an integral part of the process that gave rise to the agreement. That process—beginning with the organization of a union, continuing into the negotiation of a collective-bargaining agreement, and extending through the enforcement of the agreement—is a single, collective activity.[9] Obviously, an employee could not invoke a right grounded in a collective-bargaining agreement were it not for the prior negotiating activities of his fellow employees. Nor would it make sense for a union to negotiate a collective-bargaining agreement if individual employees could not invoke the rights thereby created against their employer. Moreover, when an employee invokes a right grounded in the collective-bargaining agreement, he does not stand alone. Instead, he brings to bear on his employer the power and resolve of all his fellow employees. When, for instance, James Brown refused to drive a truck he believed to be unsafe, he was in effect reminding his employer that he and his fellow employees, at the time their collective-bargaining agreement was signed, had extracted a promise from City Disposal that they would not be asked to drive unsafe trucks. He was also reminding his employer that if it persisted in ordering him to drive an unsafe truck, he could reharness the power of that group to ensure the enforcement of that promise. It was just as though James Brown was reassembling his fellow union members to reenact their decision not to drive unsafe trucks. A lone employee's invocation of a right grounded in his collective-bargaining agreement is, therefore, a concerted activity in a very real sense.

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[8] Section 7 lists these and other activities initially and concludes the list with the phrase "*other* concerted activities," thereby indicating that the enumerated activities are deemed to be "concerted." See n. 1, *supra*.

Furthermore, the acts of joining and assisting a labor organization, which § 7 explicitly recognizes as concerted, are related to collective action in essentially the same way that the invocation of a collectively bargained right is related to collective action. When an employee joins or assists a labor organization, his actions may be divorced in time, and in location as well, from the actions of fellow employees. Because of the integral relationship among the employees' actions, however, Congress viewed each employee as engaged in concerted activity. The lone employee could not join or assist a labor organization were it not for the related organizing activities of his fellow employees. Conversely, there would be limited utility in forming a labor organization if other employees could not join or assist the organization once it is formed. Thus, the formation of a labor organization is integrally related to the activity of joining or assisting such an organization in the same sense that the negotiation of a collective-bargaining agreement is integrally related to the invocation of a right provided for in the agreement. In each case, neither the individual activity nor the group activity would be complete without the other.[10]

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[9] As this Court noted in a different context in *Conley* v. *Gibson*, 355 U. S. 41, 46 (1957): "Collective bargaining is a continuing process. Among other things, it involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, *and the protection of employee rights already secured by contract.*" (Emphasis added.)

The *Interboro* doctrine is also entirely consistent with the purposes of the Act, which explicitly include the encouragement of collective bargaining and other "practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions." 29 U. S. C. § 151. Although, as we have said, there is nothing in the legislative history of § 7 that specifically expresses the understanding of Congress in enacting the "concerted activities" language, the general history of § 7 reveals no inconsistency between the *Interboro* doctrine and congressional intent. That history begins in the early days of the labor movement, when employers invoked the common-law doctrines of criminal conspiracy and restraint of trade to thwart workers' attempts to unionize. See *Automobile Workers* v. *Wisconsin Employment Relations Board (Briggs & Stratton)*, 336 U. S. 245, 257–258 (1949). As this Court recognized in *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33 (1937), a single employee at that time "was helpless in dealing with an employer; . . . he was dependent ordinarily on his daily wage for the maintenance of himself and family; . . . if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; . . . union was essential to give laborers opportunity to deal on an equality with their employer."

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[10] Of course, at some point an individual employee's actions may become so remotely related to the activities of fellow employees that it cannot reasonably be said that the employee is engaged in concerted activity. For instance, the Board has held that if an employer were to discharge an employee for purely personal "griping," the employee could not claim the protection of § 7. See, *e. g., Capital Ornamental Concrete Specialties, Inc.*, 248 N. L. R. B. 851 (1980).

In addition, although the Board relies entirely on its interpretation of § 7 as support for the *Interboro* doctrine, it bears noting that under § 8(a)(1) an employer commits an unfair labor practice if he or she "interfere[s] with, [or] restrain[s]" concerted activity. It is possible, therefore, for an employer to commit an unfair labor practice by discharging an employee who is not himself involved in concerted activity, but whose actions are related to other employees' concerted activities in such a manner as to render his discharge an interference or restraint on those activities. In the context of the *Interboro* doctrine, for instance, even if an individual's invocation of rights provided for in a collective-bargaining agreement, for some reason, were not concerted activity, the discharge of that individual would still be an unfair labor practice if the result were to restrain or interfere with the concerted activity of negotiating or enforcing a collective-bargaining agreement.

Congress' first attempt to equalize the bargaining power of management and labor, and its first use of the term "concert" in this context, came in 1914 with the enactment of §§ 6 and 20 of the Clayton Act, which exempted from the antitrust laws certain types of peaceful union activities. 15 U. S. C. § 17; 29 U. S. C. § 52.[11] There followed, in 1932, the Norris-La Guardia Act, which declared that "the individual . . . worker . . . shall be free from the interference, restraint, or coercion, of employers . . . in self-organization or in *other*

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[11] In § 20 of the Clayton Act, Congress provided that "no . . . injunction shall prohibit any person or persons, whether singly or *in concert*, from . . . ceasing to perform any work [or other specified activities]." 29 U. S. C. § 52 (emphasis added).

concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U. S. C. § 102 (emphasis added). This was the source of the language enacted in § 7. It was adopted first in § 7(a) of the National Industrial Recovery Act and then, in 1935, in § 7 of the NLRA. See generally Gorman & Finkin, The Individual and the Requirement of "Concert" Under the National Labor Relations Act, 130 U. Pa. L. Rev. 286, 331–346 (1981).

Against this background, it is evident that, in enacting § 7 of the NLRA, Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment. There is no indication that Congress intended to limit this protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way. Nor, more specifically, does it appear that Congress intended to have this general protection withdrawn in situations in which a single employee, acting alone, participates in an integral aspect of a collective process. Instead, what emerges from the general background of § 7—and what is consistent with the Act's statement of purpose—is a congressional intent to create an equality in bargaining power between the employee and the employer throughout the entire process of labor organizing, collective bargaining, and enforcement of collective-bargaining agreements.

The Board's *Interboro* doctrine, based on a recognition that the potential inequality in the relationship between the employee and the employer continues beyond the point at which a collective-bargaining agreement is signed, mitigates that inequality throughout the duration of the employment relationship, and is, therefore, fully consistent with congressional intent. Moreover, by applying § 7 to the actions of individual employees invoking their rights under a collective-bargaining agreement, the *Interboro* doctrine preserves the integrity of the entire collective-bargaining process; for by invoking a right grounded in a collective-bargaining agreement, the employee makes that right a reality, and breathes life, not only into the promises contained in the collective-bargaining agreement, but also into the entire process envisioned by Congress as the means by which to achieve industrial peace.

To be sure, the principal tool by which an employee invokes the rights granted him in a collective-bargaining agreement is the processing of a grievance according to whatever procedures his collective-bargaining agreement establishes. No one doubts that the processing of a grievance in such a manner is concerted activity within the meaning of § 7. See, *e. g.*, *NLRB* v. *Ford Motor Co.*, 683 F. 2d 156, 159 (CA6 1982); *Crown Central Petroleum Corp.* v. *NLRB*, 430 F. 2d 724, 729 (CA5 1970). Indeed, it would make little sense for § 7 to cover an employee's conduct while negotiating a collective-bargaining agreement, including a grievance mechanism by which to protect the rights created by the agreement, but not to cover an employee's attempt to utilize that mechanism to enforce the agreement.

In practice, however, there is unlikely to be a bright-line distinction between an incipient grievance, a complaint to an employer, and perhaps even an employee's initial refusal to perform a certain job that he believes he has no duty to perform. It is reasonable to expect that an employee's first response to a situation that he believes violates his collective-bargaining agreement will be a protest to his employer. Whether he files a grievance will depend in part on his employer's reaction and in part upon the nature of the right at issue. In addition, certain rights might not be susceptible of enforcement by the filing of a grievance. In such a case, the collective-bargaining agreement might provide for an alternative method of enforcement, as did the agreement involved in this case, see *supra*, at 825, or the agreement might be silent on the matter. Thus, for a variety of reasons, an employee's initial statement to an employer to the effect that he believes a collectively bargained right is being violated, or the employee's initial refusal to do that which he believes he is not obligated to do, might serve as both a natural prelude to, and an efficient substitute for, the filing of a formal grievance. As long as the employee's statement or action is based on a reasonable and honest belief that he is being, or has been, asked to perform a task that he is not required to perform under his collective-bargaining agreement, and the statement or action is reasonably directed toward the enforcement of a collectively bargained right, there is no justification for overturning the Board's judgment that the employee is engaged in concerted activity, just as he would have been had he filed a formal grievance.

The fact that an activity is concerted, however, does not necessarily mean that an employee can engage in the activity with impunity. An employee may engage in concerted activity in such an abusive manner that he loses the protection of § 7. See, *e. g.*, *Crown Central Petroleum Corp.* v. *NLRB*, *supra*, at 729; *Yellow Freight System, Inc.*, 247 N. L. R. B. 177, 181 (1980). Cf. *Eastex, Inc.* v. *NLRB*, 437 U. S. 556 (1978); *NLRB* v. *Babcock & Wilcox Co.*, 351 U. S. 105 (1956). Furthermore, if an employer does not wish to tolerate certain methods by which employees invoke their collectively bargained rights, he is free to negotiate a provision in his collective-bargaining agreement that limits the availability of such methods. No-strike provisions, for instance, are a common mechanism by which employers and employees agree that the latter will not invoke their rights by refusing to work. In general, if an employee violates such a provision, his activity is unprotected even though it may be concerted. *Mastro Plastics Corp.* v. *NLRB*, 350 U. S. 270 (1956). Whether Brown's action in this case was unprotected, however, is not before us.

B

Respondent argues that the *Interboro* doctrine undermines the arbitration process by providing employees with the possibility of provoking a discharge and then filing an unfair labor practice claim. Brief for Respondent 34–42. This argument, however, misses the mark for several reasons. First, an employee who purposefully follows this route would run the risk that the Board would find his actions concerted but nonetheless unprotected, as discussed above.

Second, the *Interboro* doctrine does not shift dispute resolution from the grievance and arbitration process to NLRB adjudication in any way that is different from the alternative position adopted by the Court of Appeals, and pressed upon us by respondent. As stated above, see *supra*, at 828, the Court of Appeals would allow a finding of concerted activity if two employees together invoke a collectively bargained right, if a lone employee represents another employee in addition to himself when he invokes the right, or if the lone employee invokes the right in a manner that is intended to induce at least one other employee to join him. In each of these situations, however, the underlying substance of the dispute between the employees and the employer is the same as when a single employee invokes a collectively bargained right by himself. In each case the employees are claiming that their employer violated their collective-bargaining agreement, and if the complaining employee or employees in those situations are discharged, their unfair labor practice action would be identical to an action brought by an employee who has been discharged for invoking a collectively bargained right by himself. Because the employees in each of these situations are equally well positioned to go through the grievance and arbitration process, there is no basis for singling out the *Interboro* doctrine as undermining that process any more than would the approach of respondent and the Courts of Appeals that have rejected the doctrine.

Finally, and most importantly, to the extent that the factual issues raised in an unfair labor practice action have been, or can be, addressed through the grievance process, the Board may defer to that process. See *Collyer Insulated Wire*, 192 N. L. R. B. 837 (1971); *Spielberg Manufacturing*

Co., 112 N. L. R. B. 1080 (1955). There is no reason, therefore, for the Board's interpretation of "concerted activit[y]" in § 7 to be constrained by a concern for maintaining the integrity of the grievance and arbitration process.

III

In this case, the Board found that James Brown's refusal to drive truck No. 244 was based on an honest and reasonable belief that the brakes on the truck were faulty. Brown explained to each of his supervisors his reason for refusing to drive the truck. Although he did not refer to his collective-bargaining agreement in either of these confrontations, the agreement provided not only that "[t]he Employer shall not require employees to take out on the streets or highways any vehicle that is not in safe operating condition," but also that "[i]t shall not be a violation of this Agreement where employees refuse to operate such equipment, unless such refusal is unjustified." See *supra*, at 825. There is no doubt, therefore, nor could there have been any doubt during Brown's confrontations with his supervisors, that by refusing to drive truck No. 244, Brown was invoking the right granted him in his collective-bargaining agreement to be free of the obligation to drive unsafe trucks. Moreover, there can be no question but that Brown's refusal to drive the truck was reasonably well directed toward the enforcement of that right. Indeed, it would appear that there were no other means available by which Brown could have enforced the right. If he had gone ahead and driven truck No. 244, the issue may have been moot.

Respondent argues that Brown's action was not concerted because he did not explicitly refer to the collective-bargaining agreement as a basis for his refusal to drive the truck. Brief for Respondent 21–22. The Board, however, has never held that an employee must make such an explicit reference for his actions to be covered by the *Interboro* doctrine, and we find that position reasonable. We have often recognized the importance of "the Board's special function of applying the general provisions of the Act to the complexities of industrial life." *NLRB* v. *Erie Resistor Corp.*, 373 U. S. 221, 236 (1963). As long as the nature of the employee's complaint is reasonably clear to the person to whom it is communicated, and the complaint does, in fact, refer to a reasonably perceived violation of the collective-bargaining agreement, the complaining employee is engaged in the process of enforcing that agreement. In the context of a workplace dispute, where the participants are likely to be unsophisticated in collective-bargaining matters, a requirement that the employee explicitly refer to the collective-bargaining agreement is likely to serve as nothing more than a trap for the unwary.

Respondent further argues that the Board erred in finding Brown's action concerted based only on Brown's reasonable and honest belief that truck No. 244 was unsafe. Brief for Respondent 38. Respondent bases its argument on the language of the collective-bargaining agreement, which provides that an employee may refuse to drive an unsafe truck "unless such refusal is unjustified." In the view of respondent, this language allows a driver to refuse to drive a truck only if the truck is objectively unsafe. Regardless of whether respondent's interpretation of the agreement is correct, a question as to which we express no view, this argument confuses the threshold question whether Brown's conduct was concerted with the ultimate question whether that conduct was protected. The rationale of the *Interboro* doctrine compels the conclusion that an honest and reasonable invocation of a collectively bargained right constitutes concerted activity, regardless of whether the employee turns out to have been correct in his belief that his right was violated. See Part II, *supra*. No one would suggest, for instance, that the filing of a grievance is concerted only if the grievance turns out to be meritorious. As long as the grievance is based on an honest and reasonable belief that a right had been violated, its filing is a concerted activity because it is an integral part of the process by which the collective-bargaining agreement is enforced. The same is true of other methods by which an employee enforces the agreement. On the other hand, if the collective-bargaining agreement imposes a limitation on the means by which a right may be invoked, the concerted activity would be unprotected if it went beyond that limitation. See *supra*, at 837.

In this case, because Brown reasonably and honestly invoked his right to avoid driving unsafe trucks, his action was concerted. It may be that the collective-bargaining agreement prohibits an employee from refusing to drive a truck that he reasonably believes to be unsafe, but that is, in fact, perfectly safe. If so, Brown's action was concerted but unprotected. As stated above, however, the only issue before this Court and the only issue passed upon by the Board or the Court of Appeals is whether Brown's action was concerted, not whether it was protected.

IV

The NLRB's *Interboro* doctrine recognizes as concerted activity an individual employee's reasonable and honest invocation of a right provided for in his collective-bargaining agreement. We conclude that the doctrine constitutes a reasonable interpretation of the Act. Accordingly, we accept the Board's conclusion that James Brown was engaged in concerted activity when he refused to drive truck No. 244. We therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion, including an inquiry into whether respondent may continue to defend this action on the theory that Brown's refusal to drive truck No. 244 was unprotected, even if concerted.

It is so ordered.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE, JUSTICE POWELL, and JUSTICE REHNQUIST join, dissenting.

Under the *Interboro* doctrine, an individual employee is deemed to have engaged in "concerted activit[y]," within the meaning of § 7 of the National Labor Relations Act (Act), 29 U. S. C. § 157, if the right he reasonably and in good faith asserts is grounded in his employer's collective-bargaining agreement.[1] On this view, the reasonable, good-faith assertion of a right contained in the collective-bargaining agreement is said to be an extension of the concerted action that produced the agreement; alternatively, the reasonable, good-faith assertion of the contract right is said to affect the rights of all the other employees in the work force. See *ante,* at 829. Thus, if the employer "interfere[s] with, restrain[s], or coerce[s]" the employee in response to the latter's assertion of the alleged contract right, the *Interboro* doctrine enables the employee to file a § 8(a)(1) unfair labor practice charge with the National Labor Relations Board (Board). See 29 U. S. C. § 158(a)(1). Although the concepts of individual action for personal gain and "concerted activity" are intuitively incompatible,[2] the Court today defers to the Board's judgment that the *Interboro* doctrine is necessary to safeguard the exercise of rights previously won in the collective-bargaining process. Since I consider the *Interboro* doctrine to be an exercise in undelegated legislative power by the Board, I respectfully dissent.

In my view, the fact that the right the employee asserts ultimately can be grounded in the collective-bargaining agreement is not enough to make the individual's self-interested action concerted. If it could, then *every* contract claim could be the basis for an unfair labor practice complaint. But the law is clear that an employer's alleged violation of a collective agreement cannot, by itself, provide the basis for an unfair labor practice complaint. See *NLRB* v. *C & C Plywood Corp.*, 385 U. S. 421, 427–428 (1967); *Charles Dowd Box Co.* v. *Courtney*, 368 U. S. 502, 509–513 (1962). Congress once considered a proposal that would have given the Board "general jurisdiction over all alleged violations of collective bargaining agreements." *NLRB* v. *C & C Plywood Corp.*, 385 U. S., at 427. But it realized that "[t]o have conferred upon the National Labor Relations Board generalized power to determine the rights of parties under all collective agreements would have been a step toward governmental regulation of the terms of those agreements." *Ibid.* Thus, Congress expressly decided that, "[o]nce [the] parties have made a collective bargaining contract[,] the enforcement of that contract should be left to the usual processes of the law and not to the . . . Board." H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 42 (1947). By basing the determination whether activity is "concerted" on the assertion's ultimate grounding in the collective-bargaining agreement,[3] the *Interboro* doctrine's extension of the concerted activity proviso transfers the final authority for interpreting all contracts and for resolving all contract disputes back to the Board. This arrogation of power violates Congress' decision to the contrary.

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[1] See *Interboro Contractors, Inc.,* 157 N. L. R. B. 1295, 1298 (1966), enf'd, 388 F. 2d 495 (CA2 1967); see also *Bunney Bros. Construction Co.,* 139 N. L. R. B. 1516, 1519 (1962).

[2] The Court and the Board agree that the Act cannot be read to cover, or to give the Board jurisdiction over, purely personal, though work-related, claims of individual employees. See *ante,* at 833, n. 10; Brief for Petitioner 16, and n. 9. They also agree that the mere fact that an asserted right can be presumed to be of interest to other employees is not a sufficient basis for labeling it "concerted." See *ante,* at 829, n. 6; *Meyers Industries, Inc.,* 268 N. L. R. B. 493 (1984).

Of course, the Board has considerable discretion to act on contractual matters which are incident to unfair labor practice proceedings. See *NRLB* v. *C & C Plywood*, *supra.* But the fact that the Board can resolve contractual matters incident to unfair labor practice disputes does not give it authority to make unfair labor practice claims out of the contractual disputes themselves. The statutory authority to interpret *some* contract provisions is not authority to resolve *all* labor contract disputes.[4] Congress' decision not to give the Board this broad power indicates that it considered the difference between individual and concerted activity to be a meaningful one. Indeed, when viewed in light of the scheme Congress created for enforcing labor contract rights, the *Interboro* doctrine turns out to be nothing less than a Trojan horse dressed up in legal form.

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[3] The *Interboro* doctrine is especially disturbing in this respect, since it does not require the individual expressly to refer to the contract provision supporting the claim or even to be aware of the existence of the agreement. See *ante*, at 839–841; accord, 256 N. L. R. B. 451, 454 (1981). One would think that a rule defining "concerted activity" would require the employee to have some idea that he is engaging in it.

This Court has previously recognized that the labor laws were designed to encourage employees to act together. See, *e. g.*, *NLRB* v. *J. Weingarten, Inc.*, 420 U. S. 251, 260–264 (1975). Even a single employee acting in good faith and asserting a right contained in the collective-bargaining agreement may be too fearful, inarticulate, or lacking in skill to relate accurately either the event being investigated or the relevant extenuating factors. Other disinterested employees, especially knowledgeable union stewards, can assist the employee and the employer in eliciting the relevant facts and in preventing misunderstandings and hard feelings. The participation of other employees may save production time, reduce administrative expenses, and avoid unnecessary discharges and disciplinary action. By providing an increased degree of statutory coverage to employees participating in that process, the labor laws encourage and preserve the "practice and procedure of collective bargaining." *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U. S. 50, 62 (1975). The fact that two employees receive coverage where one acting alone does not is therefore entirely consistent with the labor laws' emphasis on collective action. See *NRLB* v. *Allis-Chalmers Mfg. Co*, 388 U. S. 175, 180 (1967); *Republic Steel Corp.* v. *Maddox*, 379 U. S. 650, 653 (1965).

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[4] The Court rather glibly suggests that, to the extent factual issues raised in an unfair labor practice proceeding have been, or can be, addressed through the grievance process, the Board will defer to that process. See *ante*, at 838–839. Yet the Court does not discuss why the Board did not defer to that process in this case, where the union determined that there was no objective basis to the grievance. *Ante*, at 827. Moreover, as I have discussed at some length elsewhere, the Board hardly applies its deferral criteria evenhandedly or consistently. See *Schaefer* v. *NLRB*, 464 U. S. 945 (1983) (O'CONNOR, J., dissenting). Finally, the question whether deferral will occur or is appropriate is relevant only if the Board has jurisdiction in the first place, and that is precisely the issue the Court must decide today.

The Court and the Board insist that, because the group has previously expressed interest in the right now being asserted, the individual's self-interested expression must be treated as "concerted" to ensure that meaning is given to the contract rights. This argument is mistaken. It confuses the employees' substantive contract entitlements with the process by which those entitlements are to be vindicated. When employees act together in expressing a mutual concern, contractual or otherwise, their action is "concerted" and the statute authorizes them to seek vindication through the Board's administrative processes.[5] In contrast, when an employee acts alone in expressing a personal concern, contractual or otherwise, his action is not "concerted"; in such cases, the statute instructs him to seek vindication through his union, and where necessary, through the courts. See *Republic Steel Corp.* v. *Maddox*, *supra*; *Hines* v. *Anchor Motor Freight, Inc.*, 424 U. S. 554 (1976). Under either scenario, the integrity of the rights won in the collective-bargaining process and the rights of all other employees are preserved. The question is whether these rights will be vindicated by administrative or by private and judicial processes. It is clear that Congress believes "day-to-day adjustments in the contract and other working rules, resolutions of new problems not covered by existing agreements, and the *protection of employee rights already secured by contract,*" *Conley* v. *Gibson*, 355 U. S. 41, 46 (1957) (emphasis added), are more suitably handled, not by the Board, but by the employees' collective representative and, if necessary, the courts. See *supra*, at 842–843. The *Interboro* doctrine is therefore against Congress' judgment as to how contract rights are best vindicated.

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[5] The Board may, of course, require the employees to first seek satisfaction from contractual arbitration and grievance procedures. See *William E. Arnold Co.* v. *Carpenters*, 417 U. S. 12 (1974). But that deferral decision can properly be made only *after* an unfair labor practice is properly filed, which requires a determination whether "concerted activity" is involved in the first instance.

Finally, the *Interboro* doctrine makes little sense when applied to the facts of this case. There is no evidence that employee James Brown discussed the truck's alleged safety problem with other employees, sought their support in remedying the problem, or requested their or his union's assistance in protesting to his employer. He did not seek to warn others of the problem or even initially to file a grievance through his union. He simply asserted that the truck was not safe enough for *him* to drive. James Brown was not engaging in "concerted activity" in any reasonable sense of the term, and therefore his employer could not have violated § 8(a)(1) of the Act when it discharged him. The fact that the right asserted can be found in the collective-bargaining agreement may be relevant to whether activity of that type should be "protected," but not to whether it is "concerted." The *Interboro* doctrine is, in my view, unreasonable in concluding otherwise.

I do not mean to imply by this dissent that conduct should not be considered "concerted" because it is engaged in by only a single employee. The crucial issue is, as the Court notes, the precise nature of the relationship that must exist between the action of an individual employee and the actions of the group. See *ante*, at 830–831. An employee certainly engages in "concerted activity" when he acts with or expressly on behalf of one or more of the other employees. And, as several of the Courts of Appeals have concluded, the statutory language can even be stretched to cover an individual who takes action with the proven object of inducing, initiating, or preparing for group action. See, *e. g.*, *ARO, Inc.* v. *NLRB*, 596 F. 2d 713, 717 (CA6 1979); *NLRB* v. *Northern Metal Co.*, 440 F. 2d 881, 884 (CA3 1971); see also *Kohls* v. *NLRB*, 203 U. S. App. D. C. 139, 142–143, 629 F. 2d 173, 176–177 (1980). But it stretches the language past its snapping point to cover an employee's action that is taken solely for personal benefit.

Accordingly, I respectfully dissent.

KOSAK *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 82-618. Argued November 7, 1983—Decided March 21, 1984

Petitioner's art collection was seized by customs officials when he was suspected of smuggling the collection into the country. Subsequently, petitioner was acquitted of the smuggling charge, and the objects of art were returned to him upon his petition for relief from civil forfeiture. He then filed an administrative complaint seeking compensation for alleged damage to the property occurring while it was in the Customs Service's custody. When the Service denied relief, petitioner filed suit in Federal District Court under the Federal Tort Claims Act (FTCA), seeking damages for the alleged injury to his property. The District Court granted the Government's motion for dismissal of the complaint or summary judgment on the ground that the claim was barred by 28 U. S. C. § 2680(c), which exempts from the coverage of the FTCA "[a]ny claims arising in respect of . . . the detention of any goods or merchandise by any officer of customs." The Court of Appeals affirmed.

Held: Section 2680(c) precludes recovery against the United States for the alleged injury to petitioner's property. Pp. 851-861.

(a) The fairest interpretation of § 2680(c)'s language "arising in respect of" is that such language means any claim "arising out of" the detention of goods, including a claim resulting from negligent handling or storage of the detained property, and is not limited to claims for damage caused by the detention itself. That § 2680(b) expressly bars actions "arising out of the loss, miscarriage, or negligent transmission" of mail does not undercut this reading of § 2680(c)'s language, but merely suggests that Congress intended § 2680(b) to be less encompassing than § 2680(c). Pp. 851-855.

(b) The legislative history of § 2680(c) supports the above interpretation. Moreover, the interpretation accords with Congress' general purposes, in creating exceptions to the FTCA, of ensuring that "certain governmental activities" not be disrupted by the threat of damages suits, of avoiding exposure of the United States to liability for excessive or fraudulent claims, and of not extending coverage of the Act to suits for which adequate remedies were already available. Pp. 855-861.

679 F. 2d 306, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, POWELL, REHNQUIST, and O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 862.

Jeffrey L. Naftulin argued the cause and filed a brief for petitioner.

Kathryn A. Oberly argued the cause for the United States. With her on the brief were *Solicitor General Lee, Assistant Attorney General McGrath, Deputy Solicitor General Geller,* and *Marc Richman.*

JUSTICE MARSHALL delivered the opinion of the Court.

The question presented in this case is whether 28 U. S. C. § 2680(c), which exempts from the coverage of the Federal Tort Claims Act "[a]ny claim arising in respect of . . . the detention of any goods or merchandise by any officer of customs," precludes recovery against the United States for injury to private property sustained during a temporary detention of the property by the Customs Service.

I

While a serviceman stationed in Guam, petitioner assembled a large collection of oriental art. When he was transferred from Guam to Philadelphia, petitioner brought his art collection with him. In his customs declaration,[1] petitioner stated that he intended to keep the contents of the collection for himself. Subsequently, acting upon information that, contrary to his representations, petitioner planned to resell portions of his collection, agents of the United States Customs Service obtained a valid warrant to search petitioner's house. In executing that warrant, the agents seized various antiques and other objects of art.

Petitioner was charged with smuggling his art collection into the country, in violation of 18 U. S. C. § 545. After a jury trial, he was acquitted. The Customs Service then notified petitioner that the seized objects were subject to civil forfeiture under 19 U. S. C. § 1592, which at the time permitted confiscation of goods brought into the United States "by means of any false statement." Relying on 19 U. S. C. § 1618, petitioner filed a petition for relief from the forfeiture.[2] The Customs Service granted the petition and returned the goods.

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[1] Because Guam is outside the customs territory of the United States, all goods imported therefrom are subject to duties. 19 U. S. C. § 1202.

Alleging that some of the objects returned to him had been injured while in the custody of the Customs Service, petitioner filed an administrative complaint with the Service requesting compensation for the damage. The Customs Service denied relief. Relying on the Federal Tort Claims Act, 28 U. S. C. §§ 1346(b), 2671–2680 (1976 ed. and Supp. V), petitioner then filed suit in the United States District Court for the Eastern District of Pennsylvania, seeking approximately $12,000 in damages for the alleged injury to his property.[3] The Government moved for a dismissal of the complaint or for summary judgment on the ground that petitioner's claim was barred by § 2680(c). The District Court granted the Government's motion.[4]

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[2] Section 1618 permits the Secretary of the Treasury to remit or mitigate a forfeiture "if he finds that such . . . forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such . . . forfeiture . . . ."

[3] Petitioner also requested damages for two other alleged injuries related to the seizure and detention of his property: the destruction of a cork pagoda by customs officials during the search of petitioner's house, and the accidental seizure of a sales receipt for a stereo receiver (without which petitioner was unable to obtain warranty repairs). App. 6–7. In his brief, petitioner argues that these two claims are segregable from his primary claim for damages resulting from the injury to the detained goods and merit separate analysis. Because petitioner did not present this argument to the Court of Appeals, we decline to consider it. See *United States* v. *Lovasco*, 431 U. S. 783, 788, n. 7 (1977).

[4] Civil Action No. 81–2054 (ED Pa. Oct. 15, 1981). The District Court did not identify the grounds for its ruling. We see no reason to doubt the inference drawn by the Court of Appeals that the District Court was persuaded by the Government's argument that § 2680(c) barred the suit. 679 F. 2d 306, 307, and n. 2. It would have been better practice, however, for the District Court to have noted the reasons for its judgment.

The Court of Appeals, with one judge dissenting, affirmed. 679 F. 2d 306 (CA3 1982). The Court of Appeals reasoned that the United States may be held liable for torts committed by its employees only on the basis of a statutory provision evincing a "'clear relinquishment of sovereign immunity.'" *Id.*, at 309 (quoting *Dalehite* v. *United States*, 346 U. S. 15, 31 (1953)). In the court's view, the Federal Tort Claims Act, as qualified by § 2680(c), fails to provide the necessary relinquishment of governmental immunity from suits alleging that customs officials damaged or lost detained property. On the contrary, the court observed, the "clear language" of § 2680(c) shields the United States from "all claims arising out of detention of goods by customs officers and does not purport to distinguish among types of harm." 679 F. 2d, at 308. On that basis, the Court of Appeals held that petitioner had failed to state a claim on which relief could be granted.

We granted certiorari to resolve a conflict in the Circuits regarding the liability of the United States for injuries caused by the negligence of customs officials in handling property in their possession.[5] 459 U. S. 1101 (1983). We now affirm.

II

A

The Federal Tort Claims Act, enacted in 1946, provides generally that the United States shall be liable, to the same extent as a private party, "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U. S. C. § 1346(b); see also 28 U. S. C. § 2674. The Act's broad waiver of sovereign immunity is, however, subject to 13 enumerated exceptions. 28 U. S. C. §§ 2680(a)–(f), (h)–(n). One of those exceptions, § 2680(c), exempts from the coverage of the statute "[a]ny claim arising in respect of . . . the detention of any goods or merchandise by any officer of customs . . . ."[6] Petitioner asks us to construe the foregoing language to cover only claims "for damage caused by the detention itself and not for the negligent . . . destruction of property while it is in the possession of the customs service." By "damage caused by the detention itself," petitioner appears to mean harms attributable to an illegal detention, such as a decline in the economic value of detained goods (either because of depreciation or because of a drop in the price the goods will fetch), injury resulting from deprivation of the ability to make use of the goods during the period of detention, or consequential damages resulting from lack of access to the goods.[7] The Government asks us to read the exception to cover all injuries to property sustained during its detention by customs officials.[8]

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[5] In three cases, Courts of Appeals have construed § 2680(c) in ways that would not bar petitioner's suit. *A & D International, Inc.* v. *United States*, 665 F. 2d 669 (CA5 1982); *A-Mark, Inc.* v. *United States Secret Service*, 593 F. 2d 849 (CA9 1978); *Alliance Assurance Co.* v. *United States*, 252 F. 2d 529 (CA2 1958). In two other cases, Courts of Appeals have read the provision as did the Third Circuit in this case. *United States* v. *One (1) Douglas A-26B Aircraft*, 662 F. 2d 1372 (CA11 1981); *United States* v. *One (1) 1972 Wood, 19 Foot Custom Boat, FL 8443 AY*, 501 F. 2d 1327 (CA5 1974). In *Hatzlachh Supply Co.* v. *United States*, 444 U. S. 460, 462, n. 3 (1980), we acknowledged the divergence in the views of the Circuits but expressly declined to decide the issue.

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[6] The full text of § 2680(c) provides:

"The provisions of [28 U. S. C. §§ 2671–2679] and section 1346(b) of this title shall not apply to—

. . . . .

"(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer."

We have no occasion in this case to decide what kinds of "law-enforcement officer[s]," other than customs officials, are covered by the exception.

[7] In view of the fact that the Tort Claims Act permits recovery only of "money damages . . . for injury or loss of property, or personal injury or death," 28 U. S. C. § 1346(b), it is unclear whether, even in the absence of § 2680(c), any of the foregoing sorts of damage would be recoverable under the Act. Cf., *e. g.*, *Idaho ex rel. Trombley* v. *United States Dept. of Army, Corps of Engineers*, 666 F. 2d 444 (CA9) (adopting a restrictive

The starting point of our analysis of these competing interpretations must, of course, be the language of § 2680(c). "[W]e assume 'that the legislative purpose is expressed by the ordinary meaning of the words used.'" *American Tobacco Co.* v. *Patterson*, 456 U. S. 63, 68 (1982) (quoting *Richards* v. *United States*, 369 U. S. 1, 9 (1962)).[9] At first blush,

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interpretation of the language of § 1346(b)), cert. denied, 459 U. S. 823 (1982). If the sorts of damages that, under petitioner's theory, are covered by § 2680(c) would not be recoverable in any event because of the limitation built into § 1346(b), § 2680(c) would be mere surplusage. The unattractiveness of such a construction of the statute, see *Colautti* v. *Franklin*, 439 U. S. 379, 392 (1979), would cast considerable doubt on petitioner's position. However, because the question of the scope of § 1346(b) has not been briefed or argued in this case, we decline to rely on any inferences that might be drawn therefrom in our decision today.

[8] Because petitioner conceded below that the injuries to his property occurred after it had been lawfully detained by customs officers, we need not consider the meaning of the term "detention" as used in the statute.

[9] The Court of Appeals, while properly emphasizing the plain language of § 2680(c) as the basis for its ruling, suggested that the structure of the Tort Claims Act should affect how that language is read. Relying on the principles that "sovereign immunity is the rule, and that legislative departures from the rule must be strictly construed," the Court of Appeals suggested that § 2680(c), as an exception from a statute waiving sovereign immunity, should be broadly construed. 679 F. 2d, at 308–309. We find such an approach unhelpful. Though the Court of Appeals is certainly correct that the exceptions to the Tort Claims Act should not be read in a way that would "'nullif[y them] through judicial interpretation,'" *id.*, at 309, unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute. See *United States* v. *Yellow Cab Co.*, 340 U. S. 543, 548, n. 5 (1951); cf. *Block* v. *Neal*, 460 U. S. 289, 298 (1983) ("'The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced'") (quoting *Anderson* v. *Hayes Construction Co.*, 243 N. Y. 140, 147, 153 N. E. 28, 29–30 (1926) (Cardozo, J.)). We think that the proper objective of a court attempting to construe one of the subsections of 28 U. S. C. § 2680 is

the statutory language certainly appears expansive enough to support the Government's construction; the encompassing phrase, "arising in respect of," seems to sweep within the exception all injuries associated in any way with the "detention" of goods. It must be admitted that this initial reading is not ineluctable; as Judge Weis, dissenting in the Court of Appeals, pointed out, it is possible (with some effort) to read the phrase, "in respect of" as the equivalent of "as regards" and thereby to infer that "the statutory exception is directed to the fact of detention itself, and that alone." 679 F. 2d, at 310. But we think that the fairest interpretation of the crucial portion of the provision is the one that first springs to mind: "any claim arising in respect of" the detention of goods means any claim "arising out of" the detention of goods, and includes a claim resulting from negligent handling or storage of detained property.

Relying on the analysis of the Second Circuit in *Alliance Assurance Co.* v. *United States*, 252 F. 2d 529 (1958), petitioner argues that the foregoing reading of the plain language of § 2680(c) is undercut by the context in which the provision appears.

> "That the exception does not and was not intended to bar actions based on the negligent destruction, injury or loss of goods in the possession or control of the customs authorities is best illustrated by the fact that the exception immediately preceding it expressly bars actions 'arising out of the loss, miscarriage, or negligent transmission' of mail. 28 U. S. C. A. § 2680(b). If Congress had similarly wished to bar actions based on the negligent loss of goods which governmental agencies other than the postal system undertook to handle, the exception in 28 U. S. C. A. § 2680(b) shows that it would have been equal to the task. The conclusion is inescapable that it

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to identify "those circumstances which are within the words and reason of the exception"—no less and no more. See *Dalehite* v. *United States*, 346 U. S. 15, 31 (1953).

> did not choose to bestow upon all such agencies general absolution from carelessness in handling property belonging to others." *Id.*, at 534.[10]

We find the conclusion reached by petitioner and the Second Circuit far from "inescapable." The specificity of § 2680(b), in contrast with the generality of § 2680(c), suggests, if anything, that Congress intended the former to be *less* encompassing than the latter. The motivation for such an intent is not hard to find. One of the principal purposes of the Federal Tort Claims Act was to waive the Government's immunity from liability for injuries resulting from auto accidents in which employees of the Postal System were at fault.[11] In order to ensure that § 2680(b), which governs torts committed by mailmen, did not have the effect of barring precisely the sort of suit that Congress was most concerned to authorize, the draftsmen of the provision carefully delineated the types of misconduct for which the Government was not assuming financial responsibility—namely, "the loss, miscarriage, or negligent transmission of letters or postal matter"—thereby excluding, by implication, negligent handling of motor vehicles. The absence of any analogous desire to limit the reach of the statutory exception pertaining to the detention of property by customs officials explains the lack of comparable nicety in the phraseology of § 2680(c).

B

The legislative history of § 2680(c), though meager, supports the interpretation of the provision that we have derived from its language and context. Two specific aspects of the evolution of the provision are telling. First, the person who almost certainly drafted the language under consideration clearly thought that it covered injury to detained property caused by the negligence of customs officials. It appears that the portion of § 2680(c) pertaining to the detention of goods was first written by Judge Alexander Holtzoff, one of the major figures in the development of the Tort Claims Act. In his report explicating his proposals, Judge Holtzoff explained:

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[10] For reiterations of this argument, see *A & D International, Inc.* v. *United States*, 665 F. 2d, at 672; *A-Mark, Inc.* v. *United States Secret Service*, 593 F. 2d, at 850.

[11] See General Tort Bill: Hearing before a Subcommittee of the House Committee on Claims, 72d Cong., 1st Sess., 17 (1932) (testimony of Assistant Attorney General Rugg).

> "[The proposed provision would exempt from the coverage of the Act] [c]laims arising in respect of the assessment or collection of any tax or customs duty. This exception appears in all previous drafts. It is expanded, however, so as to include immunity from liability in respect of *loss in connection with the detention of goods or merchandise* by any officer of customs or excise. The additional proviso has special reference to the detention of imported goods in appraisers' warehouses or customs houses, as well as seizures by law enforcement officials, internal revenue officers, and the like." A. Holtzoff, Report on Proposed Federal Tort Claims Bill 16 (1931) (Holtzoff Report) (emphasis added).[12]

Though it cannot be definitively established that Congress relied upon Judge Holtzoff's report, it is significant that the apparent draftsman of the crucial portion of § 2680(c) believed that it would bar a suit of the sort brought by petitioner.[13]

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[12] Judge Holtzoff went on to explain that "[t]his provision is suggested in the proposed draft of the bill submitted by the Crown Proceedings Committee in England in 1927. . . ." Holtzoff Report, at 16. The relevant portion of the bill to which Holtzoff referred was even more explicit:

"No proceedings shall lie under this section—

. . . . .

"(c) for or in respect of the loss of or any deterioration or damage occasioned to, or any delay in the release of, any goods or merchandise by reason of anything done or omitted to be done by any officer of customs and excise acting as such . . . ." Report of Crown Proceedings Committee § 11(5)(c), pp. 17–18 (Apr. 1927). (It appears that this bill was never enacted into law in England.)

Second, the congressional Committees that submitted Reports on the various bills that ultimately became the Tort Claims Act suggested that the provision that was to become § 2680(c), like the other exceptions from the waiver of sovereign immunity, covered claims "arising out of" the designated conduct. Thus, for example, the House Judiciary Committee described the proposed exceptions as follows:

> "These exemptions cover claims arising out of the loss or miscarriage of postal matter; the assessment or collection of taxes or assessments; the detention of goods by customs officers; admiralty and maritime torts; deliberate torts such as assault and battery; and others." H. R. Rep. No. 1287, 79th Cong., 1st Sess., 6 (1945).[14]

The Committees' casual use of the words, "arising out of," with reference to the exemption of claims pertaining to the detention of goods substantially undermines petitioner's contention that the phrase, "in respect of," was designed to limit the sorts of suits covered by the provision.[15]

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[13] Mr. Holtzoff wrote his report while serving as Special Assistant to the Attorney General. He had been "assigned by Attorney General Mitchell to the special task of co-ordinating the views of the Government departments" regarding the proper scope of a tort claims statute. See Borchard, The Federal Tort Claims Bill, 1 U. Chi. L. Rev. 1, n. 2 (1933). Holtzoff submitted his report, in which his draft bill was contained, to Assistant Attorney General Rugg, who in turn transmitted it to the General Accounting Office of the Comptroller General. Insofar as Holtzoff's report embodied the views of the Executive Department at that stage of the debates over the tort claims bill, it is likely that, at some point, the report was brought to the attention of the Congressmen considering the bill. We agree with the dissent that, because the report was never introduced into the public record, the ideas expressed therein should not be given great weight in determining the intent of the Legislature. See *post*, at 863–864. But, in the absence of any direct evidence regarding how Members of Congress understood the provision that became § 2680(c), it seems to us senseless to ignore entirely the views of its draftsman.

[14] See also S. Rep. No. 1400, 79th Cong., 2d Sess., 33 (1946); S. Rep. No. 1196, 77th Cong., 2d Sess., 7 (1942); H. R. Rep. No. 2245, 77th Cong., 2d Sess., 10 (1942).

Of perhaps greater importance than these two clues as to the meaning of the prepositional phrase contained in § 2680(c) is the fact that our interpretation of the plain language of the provision accords with what we know of Congress' general purposes in creating exceptions to the Tort Claims Act.[16] The three objectives most often mentioned in the legislative history as rationales for the enumerated exceptions are: ensuring that "certain governmental activities" not be disrupted by the threat of damages suits; avoiding exposure of the United States to liability for excessive or fraudulent claims; and not extending the coverage of the Act to suits for which adequate remedies were already available.[17]

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[15] Cf. 679 F. 2d, at 309 (Weis, J., dissenting) (discussed, *supra*, at 854).

[16] The dissent objects to our effort to test our interpretation of § 2680(c) for conformity with the legislative purposes that underlie § 2680 as a whole, principally on the ground that we take inadequate account of the "central purpose" of the Tort Claims Act. *Post*, at 866–869. The dissent mistakes the nature of our analysis. Our view is that the language of § 2680(c) is inclusive enough to exempt the United States from liability for negligence in the handling or storage of goods detained by the Customs Service, see *supra*, at 854. Our purpose in looking to the legislative history is merely to ensure that our construction is not undercut by any indication that Congress meant the exception to be read more narrowly. Because of the sparseness of the evidence regarding the purpose of § 2680(c) itself, see *supra*, at 855–858, we consider it advisable to consider Congress' more general objectives in excluding certain kinds of claims from the broad waiver of sovereign immunity effected by the Tort Claims Act. Because we find that our reading of § 2680(c) is consistent with those objectives, we see no need to throw our analytical net any wider.

[17] For a variety of expressions of these three purposes, see S. Rep. No. 1400, 79th Cong., 2d Sess., 33 (1946); Tort Claims: Hearings on H. R. 5373 and H. R. 6463 before the House Judiciary Committee, 77th Cong., 2d Sess., 33 (1942) (testimony of Assistant Attorney General Shea); Tort Claims Against the United States: Hearings on H. R. 7236 before Subcommittee No. 1 of the House Judiciary Committee, 76th Cong., 3d Sess., 22 (1940) (testimony of Alexander Holtzoff); Hearings, *supra* n. 11, at 17

The exemption of claims for damage to goods in the custody of customs officials is certainly consistent with the first two of these purposes. One of the most important sanctions available to the Customs Service in ensuring compliance with the customs laws is its power to detain goods owned by suspected violators of those laws.[18] Congress may well have wished not to dampen the enforcement efforts of the Service by exposing the Government to private damages suits by disgruntled owners of detained property.

Congress may also have been concerned that a waiver of immunity from suits alleging damage to detained property would expose the United States to liability for fraudulent claims. The Customs Service does not have the staff or resources it would need to inspect goods at the time it seizes them. Lacking a record of the condition of a piece of property when the Service took custody of it, the Government would be in a poor position to defend a suit in which the owner alleged that the item was returned in damaged condition.[19] Congress may have reasoned that the frequency with

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(testimony of Assistant Attorney General Rugg); Holtzoff Report, at 15. To our knowledge, the only arguably relevant specific statement as to the purpose of § 2680(c) appears in the testimony of Alexander Holtzoff before a Subcommittee of the Senate Judiciary Committee. Holtzoff emphasized the adequacy of existing remedies as a justification for the portion of the provision pertaining to the recovery of improperly collected taxes; he did not proffer an explanation for the portion of the provision pertaining to the detention of goods. Tort Claims Against the United States: Hearings on S. 2690 before a Subcommittee of the Senate Committee on the Judiciary, 76th Cong., 3d Sess., 38 (1940).

[18] See, *e. g.*, 19 U. S. C. § 1594 (authorizing seizure of "a vessel or vehicle" to force payment of assessed penalties); 19 U. S. C. § 1595a(a) (authorizing seizure of property used to facilitate the illegal importation of other goods).

[19] The Government's vulnerability to fraudulent claims would be especially great in a case in which the Customs Service took custody of the goods from a shipper rather than from the owner. The shipper would contend that it exercised due care in the handling of the goods. The owner would demonstrate that he received the goods in damaged condition. In the absence of an extensive system for accounting for the movements and

which the Government would be obliged to pay undeserving claimants if it waived immunity from such suits offset the inequity, resulting from retention of immunity, to persons with legitimate grievances.

To a lesser extent, our reading of § 2680(c) is consistent with the third articulated purpose of the exceptions to the Tort Claims Act. At common law, a property owner had (and retains) a right to bring suit against an individual customs official who negligently damaged his goods.[20] Title 28 U. S. C. § 2006 provides that judgments in such suits shall be paid out of the Federal Treasury if a court certifies that there existed probable cause for the detention of the goods and that the official was acting under the directions of an appropriate supervisor.[21] Congress in 1946 may have concluded that this mode of obtaining recompense from the United States (or from an individual officer) was "adequate."[22] To be sure, there are significant limitations to the common-law remedy, the most important of which is the apparent requirement that the plaintiff prove negligence on the part of a particular cus-

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treatment of property in its custody, the Customs Service would be hard pressed to establish that its employees were not at fault. We do not suggest that such a dilemma would automatically give rise to liability on the part of the United States; that of course would depend upon the substance of the pertinent state tort law. See 28 U. S. C. §§ 1346(b), 2674. But uneasiness at the prospect of such scenarios may have influenced Congress when it carved out this exception to the Tort Claims Act.

[20] See, *e. g.*, *States Marine Lines, Inc.* v. *Shultz*, 498 F. 2d 1146, 1149 (CA4 1974); *Dioguardi* v. *Durning*, 139 F. 2d 774, 775 (CA2 1944); J. Story, Commentaries on the Law of Bailments §§ 613, 618, pp. 387, 390 (1832).

[21] See *States Marine Lines, Inc.* v. *Shultz*, *supra*, at 1149–1150.

[22] We note that there exists at least one other remedial system that might enable someone in petitioner's position to obtain compensation from the Government. If the owner of property detained by the Customs Service were able to establish the existence of an implied-in-fact contract of bailment between himself and the Service, he could bring suit under the Tucker Act, 28 U. S. C. § 1491 (1976 ed., Supp. V). See *Hatzlachh Supply Co.* v. *United States*, 444 U. S. 460 (1980).

toms official.[23] Such proof will often be difficult to come by. But Congress may well have concluded that exposing the United States to liability for injury to property in the custody of the Customs Service under circumstances in which the owner is not able to demonstrate such specific negligence would open the door to an excessive number of fraudulent suits.[24]

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[23] At oral argument, the Government contended that a property owner could recover against the United States under this theory by bringing suit against the relevant District Director of the Customs Service and would not be obliged to prove negligence on the part of any specific customs official. Tr. of Oral Arg. 28–29. Though we do not decide the issue, such an interpretation of the common-law doctrine appears questionable to us. Except in cases in which the property owner could demonstrate that the Director expressly authorized tortious conduct by a subordinate, it seems likely that the owner would be obliged to identify and bring suit against the individual whose malfeasance caused the injury to his goods.

[24] The dissent finds "internally inconsistent" the foregoing "hypothetical rationales" for § 2680(c). *Post*, at 865. Thus, the dissent suggests that the fact that an owner of goods damaged by the Customs Service might recover from the United States under the Tucker Act, see n. 22, *supra*, makes it unlikely that Congress would have been chary of creating a remedy under the Tort Claims Act because of the risk of exposing the Government to an excessive number of fraudulent suits. *Post*, at 865–866. But the requirement that an owner, to recover under the Tucker Act, prove that the Service entered into an implied-in-fact contract of bailment would operate to screen out many fraudulent claims; Congress rationally could have concluded that, in view of the absence of any comparable filter in the Tort Claims Act, it was inadvisable to extend the coverage of the latter to owners of detained goods. Similarly, the dissent finds it implausible that Congress might have feared that the creation of a remedy against the United States under the Tort Claims Act would inhibit vigorous enforcement of the customs laws, see *supra*, at 859, when there already existed a common-law remedy against customs officials for negligence in the handling of goods, see *supra*, at 860–861. *Post*, at 866. But, as explained above, the apparent requirement that the owner, to recover under the common law, prove negligence on the part of a specific customs official, see *supra*, at 860–861, and n. 23, combined with the obligation of the United States to indemnify the official if he acted under proper authority, see *supra*, at 860, would have minimized the effect of the extant remedies on the willingness of the Service to adopt vigorous enforcement policies and the willingness of its officials

III

Petitioner and some commentators argue that § 2680(c) should not be construed in a fashion that denies an effectual remedy to many persons whose property is damaged through the tortious conduct of customs officials.[25] That contention has force, but it is properly addressed to Congress, not to this Court. The language of the statute as it was written leaves us no choice but to affirm the judgment of the Court of Appeals that the Tort Claims Act does not cover suits alleging that customs officials injured property that had been detained by the Customs Service.

It is so ordered.

JUSTICE STEVENS, dissenting.

The Government's construction of 28 U. S. C. § 2680(c) is not the one that "first springs" to my mind. *Ante*, at 854. Rather, I read the exception for claims arising "in respect of . . . the detention of any goods" as expressing Congress' intent to preclude liability attributable to the temporary interference with the owner's possession of his goods, as opposed to liability for physical damage to his goods. That seems to me to be the normal reading of the statutory language that Congress employed, and the one that most Members of Congress voting on the proposal would have given it. Moreover, my reading, unlike the Court's,[1] is supported by an examina-

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to implement those policies. Congress might well have feared that the creation of a remedy under the Tort Claims Act would have increased the liability of the United States to such a degree as to curtail the exercise by the Service of its authority to detain goods.

[25] Comment, Governmental Liability for Customs Officials' Negligence: *Kosak* v. *United States*, 67 Minn. L. Rev. 1040 (1983); Note, Using the Federal Tort Claims Act to Remedy Property Damage Following Customs Service Seizures, 17 U. Mich. J. of L. Ref. 83 (1983).

[1] The majority maintains that " 'any claim arising in respect of' the detention of goods means any claim 'arising out of' the detention of goods, and includes a claim resulting from negligent handling or storage of detained property." *Ante*, at 854.

tion of the language used in other exceptions. Congress did not use the words "arising out of" in § 2680(c) but did use those words in three other subsections of the same section of the Act. See §§ 2680(b), (e), and (h). Absent persuasive evidence to the contrary, we should assume that when Congress uses different language in a series of similar provisions, it intends to express a different intention.

The language of the statute itself is thus clear enough to persuade me that Congress did not intend to exempt this property damage claim from the broad coverage of the Act. I would, of course, agree that if there were legislative history plainly identifying a contrary congressional intent, that history should be given effect. I do not believe, however, that it is proper for the Court to attach any weight at all to the kind of "clues" to legislative intent that it discusses, or to its concept of the "general purposes" that motivated various exceptions to the statute. Because the Court has done so, however, I shall respond to both parts of its rather creative approach to statutory construction.

I

In the entire 15-year history preceding the enactment of the Tort Claims Act in 1946, the Court finds only two "clues" that it believes shed any light on the meaning of § 2680(c). The first—the so-called "Holtzoff Report"—is nothing but an internal Justice Department working paper prepared in 1931 and never even mentioned in the legislative history of the 1946 Act. There is no indication that any Congressman ever heard of the document or knew that it even existed. The position of the majority—that it is "significant" that the "apparent draftsman" of the relevant language himself "believed that it would bar a suit of the sort brought by petitioner," *ante*, at 856–857—is manifestly ill-advised. The intent of a lobbyist—no matter how public spirited he may have been—should not be attributed to the Congress without positive evidence that elected legislators were aware of and shared the lobbyist's intent.

Unless we know more about the collective legislative purpose than can be gleaned from an internal document prepared by a person who was seeking legislative action, we should be guided by the sensible statement that "in construing a statute . . . the worst person to construe it is the person who is responsible for its drafting. He is very much disposed to confuse what he intended to do with the effect of the language which in fact has been employed." *Hilder* v. *Dexter*, [1902] A. C. 474, 477 (Halsbury, L. C., abstaining).[2] If the draftsman of the language in question intended it to cover such cases as this one, he failed.

The second "clue" relied upon by the majority consists of a brief summary in the House Committee Report which casually uses the prepositional phrase "arising out of" to introduce a truncated list of the exceptions. *Ante*, at 857. But the "casual" use of the latter phrase in the Committee Report is as understandable as it is insignificant. It is nothing more than an introduction. In such an introduction, precision of meaning is naturally and knowingly sacrificed in the interest of brevity.

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[2] The majority's analysis, it should be observed, puts the cart before the horse.

"The essence of bill drafting is placing a legislative proposal in the proper legal phraseology and form to achieve congressional intent. It is primarily a task of legal analysis and research rather than of composition. . . . Framing the legal language to embody congressional purpose is not as difficult as ascertaining what that purpose is in its entirety. While a committee (or individual member of Congress, as the case may be) is in the process of working out what it wants to do, the legislative counsel assist it by explaining the effect of alternative proposals. Even after the committee (or Congressman) has settled upon the major outlines of a measure, subsidiary policy questions seem to unfold endlessly. The legislative counsel must point up all of those for the committee (or Congressman) to decide. To accomplish that, the legislative counsel must envisage the broad application of the proposed law in all of its ramifications." K. Kofmehl, Professional Staffs of Congress 189 (3d ed. 1977) (footnote omitted).

Many bills are of course initially drafted in the Executive Branch. After today's decision, we can anticipate executive agencies searching long dormant files for documents similar to the Holtzoff Report. We can also anticipate that private parties will attempt to capitalize on this new reservoir of "legislative" history as well, through discovery and perhaps the Freedom of Information Act. In light of the Government's reliance on the Holtzoff Report, presumably it will not assert that this kind of material is privileged when private parties are in search of "legislative" intent.

Finally, the language in some bills is initially drafted by private lobbyists. One doubts that the majority would find "significant" the intention of such a draftsman when that intention was not shared with the Congress.

II

The Court's reliance on the "general purposes" for creating exceptions does nothing more than explain why Congress might reasonably have decided to create this exception.[3] Those purposes are no more persuasive than the general purposes motivating the enactment of the broad waiver of sovereign immunity effected by the statute itself.

The hypothetical rationales attributed to Congress by the majority are also internally inconsistent. If Congress, as a matter of public policy, determined that these claims should not be entertained because of the possibility for fraud, the majority's suggestion that petitioner may have a remedy under the Tucker Act is quite inexplicable.[4] Similarly, if Congress "may well have wished not to dampen the enforcement efforts of the Service by exposing the *Government* to private damages suits by disgruntled owners of detained property," *ante*, at 859 (emphasis added), its failure to abrogate the common-law remedy against the individual customs officer is inexplicable. For I would assume that customs officers' enforcement efforts would be dampened far more by a threat of personal liability than by a threat of governmental liability. Reliance on an assumed reluctance to waive immunity regarding claims for which "adequate" remedies were already available simply begs the question. A basic reason for the Tort Claims Act was, of course, the inadequacy of the existing remedies, and there is no indication in the legislative history that Congress considered the previous remedies in this specific area adequate.

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[3] Some of the majority's *ipse dixit* about the Customs Service does merit response. We are told, for example, without citation to any authority, much less any statements in the legislative history, that the Customs Service does not have the staff or resources to inspect the goods it detains. *Ante*, at 859. Notwithstanding the fact that it appears the Service undertakes such inspections now to some extent, see U. S. Customs Service, Customs Inspector Handbook, §§ 3.55(b), 5.72 (1982); see generally 19 CFR §§ 158.21–158.30 (1983), one wonders what the staff which detain the items are doing with them if not inspecting them, why they cannot make a record of the condition of the goods, why this burden would be onerous, and why the Congress would want Government officials charged with custody of a citizen's property to be free from this burden that any reasonably prudent person under the circumstances would undertake. The answer, or so it would seem, is that the "Government, as a defendant, can exert an unctuous persuasiveness because it can clothe official carelessness with a public interest. Hence, one of the unanticipated consequences of the Tort Claims Act has been to throw the weight of government influence on the side of lax standards of care in the negligence cases which it defends." *Dalehite* v. *United States*, 346 U. S. 15, 50 (1953) (Jackson, J., dissenting).

A discussion of the general reasons for drafting exceptions to the Act is no more enlightening regarding the specific exception at issue here than a consideration of the principal purpose that Congress sought to achieve by enacting this important reform legislation.

Tort claims bills had floundered on legislative shoals for nearly two decades.[5] A general waiver of sovereign immunity for torts was finally propelled into law by the legislative reform movement which culminated in the Legislative Reorganization Act of 1946. *E. g., United States* v. *Yellow Cab Co.*, 340 U. S. 543, 549–550 (1951). The "overwhelming purpose" of the Congress which enacted the Tort Claims Act was to remove the burden of dealing with tort claims from Congress which had adjudicated these claims in the form of passing private bills, and the "reports at that session omitted previous discussions which tended to restrict the scope of the Tort Claims bill." *Ibid.* Hence, the Joint Committee on the Organization of Congress recommended that "Congress delegate authority to the Federal Courts and to the Court of Claims to hear and settle claims against the Federal Government," explaining its recommendation, and the shortcomings of resolving such claims through consideration of private bills, as follows:

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[4] Cf. *Feres* v. *United States*, 340 U. S. 135, 139 (1950) ("This Act, however, should be construed to fit, so far as will comport with its words, into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole. The Tort Claims Act was not an isolated and spontaneous flash of congressional generosity. It marks the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit").

[5] The majority largely relies on the legislative history of bills which were never enacted into law. All legislation has it germinal period, but the intentions of the proponents of previous legislation which was never enacted are at most a secondary aid to construing the intent of those that enacted a descendant of it. The earlier legislation may have failed to be enacted for a variety of reasons, of course, but one reason for failure is that the reasons

> "Congress is poorly equipped to serve as a judicial tribunal for the settlement of private claims against the Government of the United States. This method of handling individual claims does not work well either for the Government or for the individual claimant, while the cost of legislating the settlement in many cases far exceeds the total amounts involved.
>
> "Long delays in consideration of claims against the Government, time consumed by the Claims Committees

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offered by the proponents were unconvincing to the majority of the Congress. The same proposal may be justified on different rationales, however, and it is the rationale of the Congress which enacts a measure which defines congressional purpose and intent. In the context of the Federal Tort Claims Act, we have recognized the extremely limited utility, and sometimes misleading nature, of reliance upon the legislative history of the plethora of earlier tort claims bills which failed to command a consensus, acknowledging that the measure ultimately enacted was presented to the Congress in a "new aspect" when it become Part IV of the proposed Legislative Reorganization Act. *United States* v. *Yellow Cab Co.*, 340 U. S. 543, 550–552, and n. 8 (1951).

> of the House and Senate, and crowded private calendars combine to make this an inefficient method of procedure.
>
> "The United States courts are well able and equipped to hear these claims and to decide them with justice and equity both to the Government and to the claimants. . . ." Report of the Joint Committee on the Organization of Congress pursuant to H. Con. Res. 18, S. Rep. No. 1011, 79th Cong., 2d Sess., 25 (1946), H. R. Rep. No. 1675, 79th Cong., 2d Sess., 25 (1946).[6]

If our construction of the narrow provision before us is to be determined by reference to broad purposes, in the context of the 1946 Act the exceptions are best rationalized by reference to Congress' central purpose. Absent specific legislative history pertaining to the sort of claims involved in this case, the general bases for exceptions relied upon by the majority are surely less persuasive than the overwhelming purpose of the statute. Courts of law have been up to the task of discovering fraud for centuries; it is completely unrealistic to suggest that Congress did not think the judiciary up to this task, or that it wanted to reserve such cases for its own adjudication because it is better equipped to weed out fraudulent claims.

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[6] See, *e. g.*, S. Rep. No. 1400, 79th Cong., 2d Sess., 29–31 (1946); see also *Dalehite* v. *United States*, 346 U. S., at 24–25; *United States* v. *Yellow Cab Co.*, 340 U. S., at 548–550 (The Federal Tort Claims Act "merely substitutes the District Courts for Congress as the agency to determine the validity and amount of [tort] claims." *Id.*, at 549); *Feres* v. *United States*, *supra*, at 140.

The Tort Claims Act was one part of the Legislative Reorganization Act of 1946. The Legislative Reorganization Act was the product of a year of work by the Joint Committee on the Organization of Congress. *E. g.*, S. Rep. No. 1400, *supra*, at 1. The Joint Committee, however, was not empowered to report legislation. See H. Con. Res. 18, 79th Cong., 1st Sess. (1945). The bill embodying its work, S. 2177, 79th Cong., 2d Sess., sponsored by Senator La Follette (the Chairman of the Joint Committee) was referred to a Special Committee on the Organization of the Congress in the Senate, chaired by Senator La Follette, created for the purpose of reporting the bill. See S. Res. 260, 79th Cong., 2d Sess. (1946). In the House, the Committee on Rules simply reported a rule permitting floor consideration of S. 2177, as passed in the Senate, and a substitute proposed by Representative Monroney (the Vice Chairman of the Joint Committee). See H. Res. 717, 79th Cong., 2d Sess. (1946).

In the final analysis, one must conclude that the legislative history provides only the most general guidance on resolving the issue in this case. For any basic policy argument in favor of making an exception will support a broad construction of the provision in question, just as any basic policy argument in favor of the Act's waiver of sovereign immunity will support a narrow construction of this or any other exception. The Government's policy arguments respecting the administrative burden on the Customs Service and the potential for fraudulent claims, like petitioner's policy arguments, are "properly addressed to Congress, not to this Court." *Ante*, at 862.

III

Therefore, this is "a case for applying the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute." *Greenwood* v. *United States*, 350 U. S. 366, 374 (1956). I would acknowledge—indeed I do acknowledge—that the Court's reading of the statutory language is entirely plausible. I would, however, tilt the scales in favor of recovery by attaching some weight to the particular language used in § 2680(c). And I must disagree with the Court's reliance on the general purposes underlying exceptions when no consideration is given to the general purpose of the statute itself. But most importantly, I would eschew any reliance on the intent of the lobbyist whose opinion on the question before us was not on the public record.

I therefore respectfully dissent.

HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* EDWARDS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 82–874. Argued November 30, 1983—Decided March 21, 1984

Title 28 U. S. C. § 1291 grants federal courts of appeals jurisdiction over appeals from all final decisions of district courts, "except where a direct review may be had in the Supreme Court." Title 28 U. S. C. § 1252 provides in its first paragraph for such a direct appeal from a district court judgment holding an Act of Congress unconstitutional in any civil action to which the United States or any of its agencies, or an officer or employee thereof, is a party. Section 1252 further provides in its second paragraph that a party who has received notice of an appeal under the section shall take any subsequent appeal to the Supreme Court and that all appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court. Respondent filed a class action in Federal District Court against petitioner Secretary of Health and Human Services, challenging the constitutionality of § 211(a)(5)(A) of the Social Security Act, which provides that all gross income and deductions derived from a family business in community property States shall be attributed to the husband unless the wife can establish that she exercised substantially all of the management and control of the business, in which case all income would be treated as the wife's. Although petitioner conceded the unconstitutionality of § 211(a)(5)(A)'s gender-based presumption, the District Court nevertheless rejected petitioner's claim of mootness, held the statute unconstitutional, and granted respondent's motion for summary judgment. The court then found the respondent class entitled retroactively to an allocation of coproprietor income between the spouses' earnings accounts on the basis of labor contributed by each. Petitioner appealed to the Court of Appeals, challenging only the District Court's remedy. The Court of Appeals granted respondent's motion to dismiss the appeal for lack of jurisdiction under § 1291, because direct review could be had in this Court pursuant to § 1252.

Held: A party does not have a right to direct review in this Court under § 1252 unless the district court's holding of federal statutory unconstitutionality is in issue, and hence here the Court of Appeals improperly dismissed petitioner's appeal for lack of jurisdiction, since only the District Court's remedy was challenged. Pp. 876–885.

(a) While a literal reading of § 1252 would seem to give a party a right to a direct appeal to this Court under the circumstances of this case, the natural sense of § 1252 is that the holding of statutory unconstitutionality, not other issues such as attorney's fees, remedy, or related state-law claims, is what Congress wished this Court to review in the first instance. Pp. 877–879.

(b) Section 1252's structure supports this view. The conclusion inherent in that structure is that not all appeals in a case in which an Act of Congress has been held unconstitutional must be taken directly to this Court, the necessary corollary to the second paragraph of § 1252 being that in the absence of a notice of appeal under § 1252 other appeals in the case will follow the normal route for appellate review. Because direct review is linked to a court's holding a federal statute unconstitutional, the logical test of which appeals from a judgment must be brought directly to this Court and which, standing alone, must follow the normal route of appellate review, is whether the issue on appeal is the holding of statutory unconstitutionality. Pp. 879–880.

(c) The legislative history also supports the view that Congress considered the jurisdictional predicate for mandatory review by this Court to be appeal from the constitutional holding. Congress' concerns in enacting § 1252's predecessor about the separation of powers and the need for certainty and uniformity in the administration of federal law are not implicated in cases in which the Government concedes statutory unconstitutionality by its decision not to appeal that aspect of the district court's judgment. The only justification for exerting this Court's mandatory jurisdiction in a case such as this might be the considerable ramifications of district court orders, but serious consequences alone cannot support the exercise of such jurisdiction. Although remedial aspects of a case are important, the touchstone of direct appeal under § 1252 is not a party's or this Court's own judgment of the significance of a decision. In § 1252 Congress mandated direct review not simply for decisions with impact but rather for decisions whose impact was predicated upon a potentially incorrect exercise of judicial review. A construction of § 1252 that would require this Court to review collateral issues as independent matters, rather than as pendent to the holding of statutory unconstitutionality, would undermine the effectiveness of the direct appeal provision. Pp. 880–885.

Vacated and remanded.

MARSHALL, J., delivered the opinion for a unanimous Court.

John H. Garvey argued the cause for petitioner. On the briefs were *Solicitor General Lee, Assistant Attorney General McGrath, Deputy Solicitor General Geller, Edwin S. Kneedler*, and *Frank A. Rosenfeld.*

Neal S. Dudovitz argued the cause for respondent. With him on the brief was *Eileen Sweeney*.

JUSTICE MARSHALL delivered the opinion of the Court.

This case raises an issue concerning this Court's mandatory jurisdiction. Federal courts of appeals have jurisdiction over appeals from all final decisions of district courts, "except where a direct review may be had in the Supreme Court." 28 U. S. C. § 1291. Section 1252 of Title 28 provides for such a direct appeal from a United States court's judgment, in a civil proceeding to which the Government is a party, holding that an Act of Congress is unconstitutional. The issue before us is whether the Court of Appeals properly dismissed for lack of jurisdiction the Secretary of Health and Human Services' appeal from a proceeding in which a federal statute was declared unconstitutional, but in which the Secretary challenged only the District Court's remedy.

I

Respondent filed this suit against the Secretary of Health and Human Services in the United States District Court for the Northern District of California in October 1980. On behalf of a nationwide class of Social Security applicants and recipients, respondent challenged the constitutionality of § 211(a)(5)(A) of the Social Security Act, 64 Stat. 502, as amended, 42 U. S. C. § 411(a)(5)(A), which established a gender-based presumption concerning the allocation of income from family businesses in community property States.[1]

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[1] The District Court certified a class of "[a]ll applicants for or recipients of Old Age, Survivors and Disability Insurance benefits, 42 U. S. C. § 401 *et seq.*, on their own accounts as wage earners whose applications have been denied or for whom the monthly benefit amount has been reduced due to the omission from their earnings records of income earned while married and operating a trade or business in a community property state, as required by 42 U. S. C. § 411(a)(5)(A)." *Edwards* v. *Schweiker*, No. C–80–3959 (ND Cal., May 22, 1981). The class was further limited to mem-

In pretrial proceedings, the Secretary argued that the constitutional ruling sought by the class was unnecessary because the Secretary acquiesced in judicial precedents holding the challenged provision unconstitutional.[2] Indeed, shortly after respondent's complaint was filed, the Attorney General formally notified Congress that the Executive would not defend the constitutionality of the section.[3] The District Court

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bers who received a final decision from the Secretary within the 60 days prior to the filing of the lawsuit or at any time thereafter. *Edwards* v. *Schweiker*, No. C–80–3959 (ND Cal., Mar. 19, 1982).

[2] In the latter half of 1980, several courts held that the statutory presumption violated the equal protection element of the Due Process Clause. *Hester* v. *Harris*, 631 F. 2d 53, 55–56 (CA5 1980); *Carrasco* v. *Secretary of Health, Education and Welfare*, 628 F. 2d 624, 627–631 (CA1 1980); *Becker* v. *Harris*, 493 F. Supp. 991, 994–996 (ED Cal. 1980). These courts remanded to the Secretary to formulate new standards for crediting self-employment income in community property States. 631 F. 2d, at 56–57; 628 F. 2d, at 631; 493 F. Supp., at 997.

Although the Secretary had argued that § 211(a)(5)(A) is merely an eligibility requirement, not a constitutionally suspect classification based on gender, the Solicitor General later concluded that the statutory presumption could not be defended under the standards announced by this Court in *Califano* v. *Westcott*, 443 U. S. 76 (1979) (provision that rests on stereotypical gender presumptions, without more, violates due process), and *Califano* v. *Goldfarb*, 430 U. S. 199 (1977) (classification by gender must serve and be substantially related to important governmental objectives).

[3] Executive Communication 4772, 126 Cong. Rec. 29377 (1980) (notice that Solicitor General would not take an appeal from the District Court's holding in *Becker* v. *Harris*, *supra*); Executive Communication 5587, 126 Cong. Rec. 29295 (1980) (same). Congress has required the Attorney General to notify both Houses of Congress in any case in which the Attorney General considers an enacted law, at issue in the case, to be unconstitutional. See note following 28 U. S. C. § 519 (1982 ed.).

In July 1981, the agency's concession that § 211(a)(5)(A) of the Act is unconstitutional was published as Social Security Ruling 81–17c (C. E. 1981) (acquiescing in *Becker* v. *Harris*, *supra*). "Once published, a ruling is binding on all components of the Social Security Administration in accordance with [20 CFR pt. 422]. Rulings do not have the force and effect of the law or regulations but are to be relied upon as precedents in determining other cases where the facts are basically the same. A ruling may be nevertheless rejected the Secretary's claim of mootness, and granted respondent's motion for summary judgment.[4] According to the court, although the Secretary "essentially conceded the unconstitutionality of §411(a)(5)(A)," a ruling on the merits was necessary because the Department was still applying the challenged statutory section.[5]

Having held the statute unconstitutional, the District Court turned to the issue of relief. The unconstitutional provision had provided that all gross income and deductions derived from a nonpartnership trade or business in community property jurisdictions should be attributed to the husband unless the wife could establish that she exercised substantially all of the management and control of the business, in which case all income would be treated as the wife's. Having struck down this gender-based presumption, the court found the respondent class entitled to an allocation of coproprietor income between the spouses' earnings accounts on the basis of the relative amount of labor contributed by each. Finding that retroactive application of its holding was appropriate under the tests of *Chevron Oil Co.* v. *Huson*, 404 U. S. 97, 106–107 (1971), the court found that class members "are entitled to a recomputation of their earnings records, extending back to the beginning of Social Security if necessary." *Edwards* v. *Schweiker*, No. C–80–3959 (ND Cal., Jan. 22, 1982). The court entered judgment March 23, 1982.

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superseded, modified, or revoked by later legislation, regulations, court decisions or rulings." Social Security Rulings iii (C. E. 1981).

Neither Congress nor the agency had modified the statute or implementing regulations at the time this case was argued.

[4] *Edwards* v. *Schweiker*, No. C–80–3959 (ND Cal., May 22, 1981). Petitioner did not file an appeal challenging the ruling that the statute was unconstitutional. The jurisdictional statute at issue in this case permits, but does not require, an interlocutory appeal from a holding of unconstitutionality. 28 U. S. C. §1252; see *United States* v. *Clark*, 445 U. S. 23, 26–27, n. 2 (1980) (Government need not appeal before final judgment is entered).

[5] *Edwards* v. *Schweiker*, No. C–80–3959, p. 2, n. 2 (ND Cal., Jan. 22, 1982) (referring to order of May 22, 1981).

The following week the Secretary filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit.[6] In the Secretary's docketing statement, filed on May 5, 1982, the Secretary listed only matters concerning the remedy ordered by the District Court, noting that the Government conceded the unconstitutionality of the statute.[7] Respondent filed a motion to dismiss the Secretary's appeal, contending that the Court of Appeals did not have jurisdiction under 28 U. S. C. § 1291 "where a direct review may be had in the Supreme Court." Respondent argued that the Secretary had such a right to direct review to the Supreme Court under 28 U. S. C. § 1252, because the District Court had held a statute unconstitutional in a civil action to which a United States officer was a party. In a one-sentence order dated July 27,

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[6] The notice of appeal from the judgment of March 23, 1982, does not state the ground of appeal, nor is it its function to do so. See Fed. Rule App. Proc. 3(c).

[7] The relevant portion of the docketing statement provided:

"H. Brief Description of Nature of Action and Result Below:

"Plaintiffs challenged the constitutionality of 42 U. S. C. 411(a)(5)(A), which requires that where both the husband and wife worked in a family business in a community property State, all of the self-employment income must be allocated to the husband. The government conceded the statute's unconstitutionality, and the remaining issues concerned relief, in particular, the standard to apply in place of the invalid statutory standard. The district court certified a class action, and ordered that the Secretary recompute benefits on the principle that the self-employment income of the business be split between husband and wife on the basis of their relative amounts of labor.

"I. Issues to be raised on Appeal:

"The issues on appeal may include: (1) whether the district court's standard based on relative amount of labor should be applied rather than the Secretary's standard based on whether there was a true partnership between the spouses; (2) whether it was error to apply the new rule to earnings records dating back to the beginning of the self-employment program; (3) whether it was error to require that no individual lose benefits as a result of the recomputation required under the order; and (4) whether the notice that the court required be sent to potential class members is appropriate."

1982, the Court of Appeals for the Ninth Circuit granted respondent's motion to dismiss for lack of jurisdiction, citing *Donovan* v. *Richland County Assn. for Retarded Citizens*, 454 U. S. 389 (1982) *(per curiam)*. The Secretary timely filed a petition for certiorari to the Ninth Circuit seeking our review of this dismissal. Because the petition raised an important question concerning this Court's mandatory docket, we granted certiorari. 459 U. S. 1200 (1983). We conclude that a party does not have a right to direct review in the Supreme Court under 28 U. S. C. § 1252 unless the holding of federal statutory unconstitutionality is in issue. We therefore vacate and remand for reinstatement of the appeal.

II

In the normal course, a party dissatisfied with the judgment of a United States district court must first appeal to the court of appeals, and may then petition for a writ of certiorari in the Supreme Court. Recourse to the court of appeals is a matter of right, 28 U. S. C. § 1291; writs of certiorari are granted at the discretion of the Supreme Court, § 1254(1). The general rule of discretionary Supreme Court review is not without exceptions. Although this Court's mandatory jurisdiction has been minimized through legislation such as the Judge's Bill of 1925[8] and the 1976 repeal of most of the Three Judge District Court Act,[9] Congress has identified a narrow group of cases that merit the immediate and mandatory attention of this Court. Section 1252 is such a direct appeal provision.

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[8] Act of Feb. 13, 1925, 43 Stat. 936. See *Gonzalez* v. *Automatic Employees Credit Union*, 419 U. S. 90, 98, and n. 16 (1974).

[9] Act of Aug. 12, 1976, Pub. L. 94-381, §§ 1, 2, 90 Stat. 1119 (repealing 28 U. S. C. §§ 2281, 2282 (1970 ed.), amending §§ 2284, 2403). For a discussion of classes of cases that have been removed from the Court's mandatory jurisdiction since 1971, see Tushnet, The Mandatory Jurisdiction of the Supreme Court—Some Recent Developments, 46 U. Cin. L. Rev. 347, 359 (1977).

When a party has a right to pursue a direct appeal to this Court under § 1252, the normal route for appellate review is blocked, and a court of appeals is without jurisdiction. *Donovan* v. *Richland County Assn. for Retarded Citizens*, *supra*, at 389–390. Thus, the consequence of an erroneous choice of forum can be to preclude any court's review, because by the time a party discovers its error, appeal to the correct forum may be untimely. To avoid that consequence, litigants ought to be able to apply a clear test to determine whether, as an exception to the general rule of appellate review, they must perfect an appeal directly to the Supreme Court. Such a test, of course, must be crafted "with precision and with fidelity to the terms by which Congress has expressed its wishes" in the jurisdictional statute. *Cheng Fan Kwok* v. *INS*, 392 U. S. 206, 212 (1968).

The Secretary and respondent offer different tests. Respondent's position is that when the "literal requirements of § 1252 are satisfied," only the Supreme Court has jurisdiction. *Williams* v. *Zbaraz*, 448 U. S. 358, 366 (1980); see also *INS* v. *Chadha*, 462 U. S. 919, 929 (1983) ("express requisites for an appeal under § 1252 . . . have been met"). Section 1252 establishes four prerequisites for a direct appeal to the Supreme Court: the order appealed from must issue from an enumerated court; the United States or an agency or officer must be a party; the proceeding must be civil; and the order must hold an Act of Congress unconstitutional. Those prerequisites are met in the present case. Therefore, respondent argues, the Secretary's sole avenue for appellate review of the judgment was by direct appeal to this Court. Because the Secretary did not file a notice of appeal to this Court within 30 days of the District Court's order, 28 U. S. C. § 2101(a), respondent contends that the Secretary has lost her right to appellate review of any aspect of the District Court's orders.

The Secretary claims that direct review under § 1252 is available only when the correctness of the constitutional holding is at issue. She argues that a close examination of the statute and its enactment supports the conclusion that the constitutional holding must be raised on appeal, and not merely decided below, before a party must invoke direct review by the Supreme Court. Under this reading, the Secretary sought review in the proper forum because she challenged the scope of the District Court's remedy and not the correctness of its constitutional ruling. Indeed, by the Secretary's reasoning, had she filed an appeal in this Court, we would have dismissed for lack of jurisdiction.

To articulate a test to resolve the present dispute and to provide guidance for litigants and courts in future cases, we begin with the language and structure of the statute itself.

> "Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam and the District Court of the Virgin Islands and any court of record of Puerto Rico, holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.
>
> "A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court." 28 U. S. C. § 1252.

A literal reading of § 1252 tells us that parties have a right to direct appeal from a "judgment, decree or order," and not merely a right to direct appeal of a court's "holding an Act of Congress unconstitutional." Under the literal language, a party not contesting the constitutional holding would seem to be required to proceed directly to this Court for review of other aspects of the court's judgment. That literal reading gains support from the fact that Congress has not limited our review under § 1252 to the federal constitutional issue, but has mandated that when we have properly asserted jurisdiction under § 1252, the whole case is to come before us.[10]

Section 1252, however, presents a case in which "to give the surface literal meaning to a jurisdictional provision . . . would not be consistent with the 'sense of the thing' and would confer upon this Court a jurisdiction beyond what 'naturally and properly belongs to it.'"[11] When Congress created the exceptional right to bypass the court of appeals, it directly linked that right to a lower court's invalidation of an Act of Congress. Although it is in the nature of cases and controversies that the court's judgment may address not only the issue of statutory constitutionality, but other issues as well, such as attorney's fees, remedy, or related state-law claims, the natural sense of the jurisdictional provision is that the holding of statutory unconstitutionality, not these other issues, is what Congress wished this Court to review in the first instance. Thus, the sense of the statute and the literal language are at loggerheads.

The structure of § 1252 helps resolve this tension, and leads us towards the common-sense view that the constitutional holding must be at issue for direct review in this Court to lie. The first paragraph of § 1252 grants the right of direct appeal from the judgment holding an Act of Congress unconstitutional; the second paragraph brings before us the whole case, including appeals filed before and after the constitutional appeal.[12] The clear implication of the second paragraph is that parties may have properly lodged appeals in other courts prior to a § 1252 filing. Only after a party has filed a notice of direct appeal pursuant to § 1252 must all other appeals and cross-appeals in the case be taken here. The necessary corollary is that in the absence of such notice, other appeals in the case will follow the normal route for appellate review. The conclusion inherent in the structure of § 1252 is that not all appeals in a case in which an Act of Congress has been held unconstitutional must be taken directly to this Court. Because direct review is linked to a court's holding a federal statute unconstitutional, the logical test of which appeals from a judgment must be brought directly to this Court and which, standing alone, must follow the normal route of appellate review, is whether the issue on appeal is the holding of statutory unconstitutionality.

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[10] Cf. 28 U. S. C. § 1254(2) (party may appeal a court of appeals' invalidation of a state statute on federal grounds, but review on appeal "shall be restricted to the Federal questions presented").

[11] *Florida Lime and Avocado Growers, Inc.* v. *Jacobsen*, 362 U. S. 73, 94 (1960) (Frankfurter, J., dissenting) (quoting *American Security & Trust Co.* v. *District of Columbia*, 224 U. S. 491, 495 (1912)).

[12] For cases discussing our jurisdiction over the whole case when a direct appeal is properly filed pursuant to 28 U. S. C. § 1252, see *United States* v. *American Friends Service Committee*, 419 U. S. 7, 12, n. 7 (1974) *(per*

The history of the enactment of § 1252's statutory predecessor[13] also guides us to a conclusion that Congress consid-

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curiam); United States v. *Raines*, 362 U. S. 17, 27, n. 7 (1960). When we consider the whole case, we are not only implementing Congress' jurisdictional intent expressed in paragraph two of 28 U. S. C. § 1252. We are also exercising judicial discretion to administer our caseload to secure the just, speedy, and inexpensive determination of actions. Fed. Rule Civ. Proc. 1. But neither paragraph two of § 1252 nor our principle of case management should come into play unless we have established first that the Court has appellate jurisdiction.

[13] Act of Aug. 24, 1937, ch. 754, § 2, 50 Stat. 752, provided:

"In any suit or proceeding in any court of the United States to which the United States, or any agency thereof, or any officer or employee thereof, as such officer or employee, is a party, or in which the United States has intervened and become a party, and in which the decision is against the constitutionality of any Act of Congress, an appeal may be taken directly to the Supreme Court of the United States by the United States or any other party . . . ."

As in the current version, appeal could be taken from an interlocutory or final judgment, decree or order. Congress mandated that such appeals "shall be heard by the Supreme Court of the United States at the earliest possible time and shall take precedence over all other matters not of a like character." *Ibid.* The whole thrust of the bill was its focus on the special importance of lower court invalidations of federal statutes.

ered the jurisdictional predicate for mandatory direct review by the Supreme Court to be appeal from the constitutional holding.[14] Three interrelated justifications for expediting final determinations of the constitutionality of federal statutes recur in discussions of the direct appeal provision. First, when a federal judge strikes down an act of a coequal branch of government, the decision implicates separation of powers,[15] not only through the original exercise of judicial review, but also through this Court's exercise of discretion to hear such a case. By mandating direct review, Congress asserted its prerogative to define a category of important cases that the Court is not free to ignore.[16] Second, Congress jus-

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[14] Floor debate affirms that Congress understood that the predicate to direct appeal was that a party would seek review of the holding that a statute was unconstitutional. The bill's sponsor, Representative Sumners, explicated the section to mean that the Government "may appeal directly to the Supreme Court in order to expedite the determination of the constitutional question." 81 Cong. Rec. 3272 (1937); see also *id.*, at 3260 (remarks of Rep. Sumners) (case would come up to Court just on question of constitutionality); *id.*, at 3257 (remarks of Rep. Michener) (bill affects only constitutional questions); *id.*, at 3256 (remarks of Rep. Brewster) (bill eliminates delays in determining constitutional question). The sponsor emphasized the "good, practical common sense" in having "just as little delay between the enactment of Congress and the determination [of its constitutionality] as can be arranged." *Id.*, at 3268 (remarks of Rep. Sumners).

[15] The impetus in the mid-1930's to establish expedited appeal of holdings of statutory unconstitutionality was courts' response to much of the New Deal legislation, such as enjoining operation of the newly created Tennessee Valley Authority. See, *e. g.*, Appeals from Federal Courts, Hearings on S. 2176 before the Senate Committee on the Judiciary, 74th Cong, 1st Sess., 13–16 (1935).

[16] As then Senator Hugo L. Black, sponsor in the 74th Congress of a bill for direct appeal from injunctions preventing the effectuation of Acts of Congress explained:

"I see no reason why . . . we should not say to the Supreme Court, '. . . [i]t is not for you to determine whether you will take the case or not. Those who are charged primarily with enforcing the law in this country are bound to be in closer contact with the necessity for a speedy decision than you are in your court room, and they have determined that this is a case of such tified imposing mandatory jurisdiction on the Supreme Court because of the need for certainty and uniformity in federal government when an Act may have been declared unconstitutional. It is significant that the first paragraph of § 1252 authorizes a direct appeal to this Court only in civil actions "to which the United States or any of its agencies, or any officer or employee thereof, . . . is a party"; no direct appeal lies if there are only nonfederal parties to the suit. That language reveals a congressional purpose to assure an expeditious means of affirming or removing the restraint on the Federal Government's administration of the law when it would be bound by a holding that the law in question is unconstitutional.[17]

Finally, Congress expressed its sense that declarations of unconstitutionality have ramifications beyond the interests of litigants in the particular case. For this reason, the predecessor statute created the right of intervention by the Attorney General in cases between private parties when the constitutionality of an Act of Congress was drawn into question,[18] as well as the right to direct appeal from a holding

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great national moment and importance that it must be decided at once.'" *Id.*, at 20.

One commentator suggests that the existence and current definition of § 1252 mandatory jurisdiction rests on a policy of separation of powers. Tushnet, 46 U. Cin. L. Rev., at 358–365. Congressional enactment of mandatory jurisdiction provisions incorporates what the author refers to as the "importance" standard. Thus, the impact of a ruling regarding a statute is recognized as having particularly broad impact.

[17] See, *e. g.*, *McLucas* v. *DeChamplain*, 421 U. S. 21, 31 (1975) (§ 1252 language permits appeal where the Government has participated in litigation "and thus will be bound by a holding of unconstitutionality").

[18] The 1937 Act provided for notice to the Attorney General of private litigation "whenever the constitutionality of any Act of Congress affecting the public interest is drawn in question," and intervention by the United States as of right "for presentation of evidence . . . and argument upon the question of the constitutionality of such Act." Act of Aug. 24, 1937, ch. 754, 50 Stat. 751. The current version of this portion of the original bill appears at 28 U. S. C. § 2403(a).

of unconstitutionality. The Senate Report emphasized that the "decision of the constitutional question may affect the public at large, may be in respect of matters which by the Constitution are entrusted to the care of the Nation, and concerning which the Nation owes a duty to all the citizens of securing to them their common rights." S. Rep. No. 963, 75th Cong., 1st Sess., 4 (1937).[19]

The first two of these concerns are not implicated in cases in which the Government concedes statutory unconstitutionality by its decision not to appeal that aspect of the district court's judgment. Such cases raise no separation-of-powers issue, nor do they implicate the need for certainty and uniformity in the administration of federal law. In the present case, for example, the Attorney General, charged with enforcing federal laws, informed the Congress that he agreed with the courts that the challenged provision in the Social Security Act was unconstitutional.[20] Furthermore, prior to seeking review of the District Court's judgment, the Secretary had agreed not to enforce the statute anywhere and the District Court's remedial order was in effect nationwide. The decision not to raise the issue of statutory unconstitutionality on appeal obviously was intended to bind the Secretary in her nationwide administration of the Social Security Act. When the court and the affected agency reach the same conclusion, there is no need to resort to direct review under 28 U. S. C. § 1252 in an effort to remove the binding effect on the Executive Branch's administration of the law.

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[19] See also 81 Cong. Rec. 3268 (1937) (remarks of Rep. Michener) ("If," "when," and "[w]here the constitutionality [of Acts of Congress] is questioned, more than the rights of individual litigants in the suit are involved. The rights of all the people who might be affected by the laws are involved, and in these days time is of the essence in many of these important cases coming before the Supreme Court"); *id.*, at 3265 (remarks of then Rep. Fred M. Vinson) (When the constitutionality of an Act of Congress has been drawn into question, that question "affects not only the litigants in the particular case, but it affects many others. It ought to be decided right in the public interest").

[20] See n. 4, *supra.* Such concurrence of views between the Executive Branch and the Judiciary does not necessarily preclude a case or controversy over the constitutionality of a federal statute. In *INS* v. *Chadha*, 462 U. S. 919 (1983), for example, the agency and the private party agreed that a federal provision was unconstitutional. Congress, however, had intervened as a party, and contested the holding. The constitutionality of the one-House legislative veto was therefore squarely presented on direct appeal to this Court. But that is not the situation in the present case.

The only justification for exerting mandatory jurisdiction in such cases might be the considerable ramifications of district court orders; here, for example, the District Court's remedy provided retroactive relief for a nationwide class. We do not believe that serious consequences alone can support the exercise of our § 1252 jurisdiction. Congress did not enact an open-ended "impact" test for determining which cases should come to this Court for direct review. Although remedial aspects of a case are important, the touchstone of direct appeal under § 1252 is not a party's or our own judgment of the significance of a decision. We exercise that judgment under our discretion to grant certiorari in any civil or criminal case before, as well as after, rendition of judgment. 28 U. S. C. § 1254(1); this Court's Rule 18. In § 1252, Congress mandated direct review not simply for decisions with impact, but rather for decisions whose impact was predicated upon a potentially incorrect exercise of judicial review. See nn. 15, 16, *supra*.

Not only are Congress' justifications for creating an expedited method of direct review not present in cases such as this, but a construction of § 1252 that would require us to review collateral issues coming to us as independent matters, rather than as pendent to the holding of statutory unconstitutionality, would undermine the effectiveness of the direct appeal provision. If we were to adopt respondent's construction of the language, this Court would be required to give precedence to issues outside the congressional definition of public importance. We would, for example, be obliged to crowd our docket with appeals concerned solely with attorney's fee awards or pendent claims arising under state law—matters that would typically fail to meet our criteria for discretionary review. See this Court's Rule 17. Appeals of this sort would almost certainly be better handled by the courts of appeals, which is where they will lie under the interpretation of § 1252 that we adopt today.

III

We conclude, therefore, that § 1252 does not warrant a construction that would require appeals raising only issues other than statutory unconstitutionality to be taken directly to this Court. If the four prerequisites to direct appeal pursuant to 28 U. S. C. § 1252 are met, and a party seeks review of the court's holding that an Act of Congress is unconstitutional, that party should file a notice of appeal to the Supreme Court. If a party does not contest the holding of statutory unconstitutionality, and seeks review only of another portion of the court's judgment, the party should file a notice of appeal to the appropriate court of appeals. Although the formal prerequisites to direct appeal under § 1252 were met in the present case, the Secretary did not contest the holding of statutory unconstitutionality. Therefore, the Secretary's appeal belonged in the first instance in the Court of Appeals, which should not have dismissed the appeal for lack of jurisdiction. The judgment of the Court of Appeals is therefore vacated, and the cause is remanded for reinstatement of the Secretary's appeal.

It is so ordered.

BLUM, COMMISSIONER, NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES *v.* STENSON

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 81-1374. Argued January 11, 1984—Decided March 21, 1984

Respondent—who was represented by attorneys from the Legal Aid Society of New York, a private nonprofit law office—filed a civil rights action in Federal District Court on behalf of a statewide class of Medicaid recipients. The complaint challenged certain procedures utilized for termination of Medicaid benefits. The District Court certified the class and entered summary judgment for it. After the Court of Appeals affirmed, respondent filed in the District Court a request for an award of attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976, which provides that in federal civil rights actions "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." The total requested fee amounted to $118,968, consisting of $79,312 based on some 809 hours of work at rates varying from $95 to $105 per hour, plus a 50% "bonus" of $39,656 to compensate for the complexity of the case, the novelty of the issues, and the "great benefit" achieved. The District Court awarded the full amount requested, holding that the hours expended and the rates charged, in view of prevailing market rates, were reasonable, and that the 50% bonus was proper because of the quality of representation, the complexity of the issues, the riskiness of success, and the "great benefit to the large class" that was achieved. The Court of Appeals affirmed.

Held:

1. The statute and its legislative history establish that "reasonable fees" are to be calculated according to the prevailing market rates in the relevant community, not according to the cost of providing legal services, regardless of whether the prevailing party is represented by private profitmaking attorneys or nonprofit legal aid organizations. Policy arguments in favor of a cost-based standard should be addressed to Congress rather than to this Court. Pp. 892–896.

2. The District Court abused its discretion in awarding the 50% upward adjustment in the fee in this case. Pp. 896–902.

(a) There is no merit to the argument that an "upward adjustment" of a reasonable fee—calculated by multiplying the reasonable number of hours expended times a reasonable hourly fee—is never permissible. The statute and its legislative history establish that the "product of reasonable hours times a reasonable rate" normally provides a "reasonable" attorney's fee, but "in some cases of exceptional success an enhanced award may be justified." *Hensley* v. *Eckerhart*, 461 U. S. 424, 435. Pp. 896–897.

(b) However, respondent failed to carry her burden of proving that an upward adjustment was necessary to the determination of a reasonable fee in this case. The record contains no evidence supporting the District Court's conclusions that the upward adjustment was proper because of the complexity of the litigation, the novelty of the issues, the high quality of representation, and the "great benefit" to the class. These factors generally are reflected in the reasonableness of the number of billable hours or the hourly rates. Moreover, the record does not justify the District Court's upward adjustment on the basis of the "riskiness" of the law suit. Respondent established only that the hourly rates and the hours billed were reasonable. Pp. 898–902.

671 F. 2d 493, affirmed in part and reversed in part.

POWELL, J., delivered the opinion for a unanimous Court. BRENNAN, J., filed a concurring opinion, in which MARSHALL, J., joined, *post*, p. 902.

Melvyn R. Leventhal, Deputy First Assistant Attorney General of New York, argued the cause for petitioner. With him on the briefs were *Robert Abrams*, Attorney General, *Dennis H. Allee*, First Assistant Attorney General, *Peter H. Schiff*, *George D. Zuckerman*, Deputy Solicitor General, and *Marion R. Buchbinder* and *Frederick K. Mehlman*, Assistant Attorneys General.

Leon Silverman argued the cause for respondent. With him on the brief were *Kalman Finkel*, *Arthur J. Fried*, *John E. Kirklin*, and *Linda R. Blumkin*.*

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*Briefs of *amici curiae* urging reversal were filed for the United States by *Solicitor General Lee*, *Assistant Attorney General McGrath*, *Deputy Solicitor General Geller*, *Deputy Assistant Attorney General Kuhl*, *Joshua I. Schwartz*, *William Kanter*, and *Mark W. Pennak;* for the State of Alabama et al. by *Kenneth O. Eikenberry*, Attorney General of Washington, and *Thomas F. Carr*, Senior Assistant Attorney General, joined by the Attorneys General for their respective States as follows: *Charles A. Graddick* of Alabama, *Norman C. Gorsuch* of Alaska, *Robert K. Corbin* of Arizona, *Duane Woodard* of Colorado, *Joseph Lieberman* of Connecticut, *Jim Smith* of Florida, *Michael J. Bowers* of Georgia, *Tany S. Hong* of Hawaii, *Jim*

JUSTICE POWELL delivered the opinion of the Court.

Title 42 U. S. C. § 1988 (1976 ed., Supp. V) provides that in federal civil rights actions "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." The initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate. *Hensley* v. *Eckerhart*, 461 U. S. 424 (1983). Adjustments to that fee then may be made as necessary in the particular case. The

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Jones of Idaho, *Neil Hartigan* of Illinois, *Linley E. Pearson* of Indiana, *Thomas J. Miller* of Iowa, *Robert T. Stephan* of Kansas, *William J. Guste, Jr.*, of Louisiana, *Stephen H. Sachs* of Maryland, *Frank J. Kelley* of Michigan, *Hubert H. Humphrey III* of Minnesota, *John D. Ashcroft* of Missouri, *Michael T. Greely* of Montana, *Paul L. Douglas* of Nebraska, *Brian McKay* of Nevada, *Gregory H. Smith* of New Hampshire, *Irwin I. Kimmelman* of New Jersey, *Rufus L. Edmisten* of North Carolina, *Robert O. Wefald* of North Dakota, *Anthony J. Celebrezze, Jr.*, of Ohio, *Michael Turpen* of Oklahoma, *David B. Frohnmayer* of Oregon, *LeRoy S. Zimmerman* of Pennsylvania, *Dennis J. Roberts II* of Rhode Island, *Mark V. Meierhenry* of South Dakota, *William M. Leech, Jr.*, of Tennessee, *David L. Wilkinson* of Utah, *John J. Easton* of Vermont, *Gerald L. Baliles* of Virginia, *Chauncey H. Browning* of West Virginia, *Bronson C. La Follette* of Wisconsin, and *Archie G. McClintock* of Wyoming; and for the Commonwealth of Massachusetts by *Francis X. Bellotti*, Attorney General, *Thomas R. Kiley*, First Assistant Attorney General, and *Judith S. Yogman* and *Carl Valvo*, Assistant Attorneys General.

Briefs of *amici curiae* urging affirmance were filed for the Alliance for Justice by *Laura Macklin;* for the California Coalition of Welfare Rights Organizations by *Mary S. Burdick* and *Richard A. Rothschild;* for the NAACP Legal Defense and Educational Fund, Inc., et al. by *Jack Greenberg, James M. Nabrit III, Charles Stephen Ralston, Steven L. Winter, Fred N. Fishman, Robert H. Kapp, Norman Redlich, William L. Robinson, Norman J. Chachkin, E. Richard Larson, Burt Neuborne, Kenneth Kimerling, Joaquin G. Avila*, and *Morris J. Baller;* for the National Education Association et al. by *Michael H. Gottesman, Robert M. Weinberg, Julia Penny Clark, Robert H. Chanin*, and *Lawrence A. Poltrock;* for the New York State Bar Association et al. by *Haliburton Fales II;* and for Oliver Hill et al. by *Armand Derfner* and *Stephen P. Berzon.*

two issues in this case are whether Congress intended fee awards to nonprofit legal service organizations to be calculated according to cost or to prevailing market rates, and whether, and under what circumstances, an upward adjustment of an award based on prevailing market rates is appropriate under § 1988.

I

A

This suit was brought in 1978 by respondent on behalf of a statewide class of Medicaid[1] recipients pursuant to 42 U. S. C. § 1983 in the District Court for the Southern District of New York. Under New York law, one who is eligible to receive benefits under the Supplemental Security Income (SSI) program, 42 U. S. C. § 1381 *et seq.* (1976 ed. and Supp. V), automatically is eligible to receive Medicaid benefits. N. Y. Soc. Serv. Law § 363 *et seq.* (McKinney 1976). Prior to this suit, persons who qualified for Medicaid in this fashion automatically lost their benefits if they thereafter became ineligible for SSI payments. The case was decided on cross-motions for summary judgment after only one set of plaintiff's interrogatories had been served and answered. On these motions, the District Court certified the class[2] and rendered final judgment in favor of the class.

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[1] Medicaid is a program providing medical assistance to the needy. It is jointly funded by the State and Federal Governments. 42 U. S. C. §§ 1396–1396k (1976 ed., Supp. V); N. Y. Soc. Serv. Law §§ 363–369 (McKinney 1976).

[2] The certified class consisted of:

"New York State residents who received Medicaid due to their eligibility for SSI and whose Medicaid benefits have been terminated because of subsequent ineligibility for SSI without having received one or more of the following: (a) an *ex parte* determination of continued eligibility for Medicaid, independent of eligibility for SSI; (b) timely and adequate notice of such termination; (c) an opportunity for a hearing." *Stenson* v. *Blum*, 476 F. Supp. 1331, 1335 (1979).

The court enjoined the prior practice of automatic termination of benefits, and prescribed procedural rights for the certified class that included "(a) an *ex parte* determination of continued eligibility for Medicaid, independent of eligibility for SSI; (b) timely and adequate notice of such termination; (c) an opportunity for a hearing." *Stenson* v. *Blum*, 476 F. Supp. 1331, 1335 (1979). The Court of Appeals for the Second Circuit affirmed in an unpublished oral opinion from the bench. Affirmance order, *Stenson* v. *Blum*, 628 F. 2d 1345, cert. denied, 449 U. S. 885 (1980). Respondent's subsequent request for an award of reasonable attorney's fees under § 1988 is the subject of the present case.

B

Throughout this litigation, respondent was represented by attorneys from the Legal Aid Society of New York, a private nonprofit law office.[3] In November 1980, respondent filed a request for attorney's fees for the period December 1978 through the end of the litigation. Her three attorneys sought payment for some 809 hours of work at rates varying from $95 to $105 per hour.[4] This amounted to approximately $79,312. Respondent's total fee request, however, reflected a 50% increase in that fee. In her brief to the District Court, respondent explained that such an increase was necessary to compensate for the complexity of the case, the novelty of the issues, and the "great benefit" achieved. The total requested fee amounted to approximately $118,968. Petitioner opposed the fee award on the grounds that the rates were exorbitant, the number of hours charged were unreasonable and duplicative, and the 50% "bonus" was improper.

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[3] The Legal Aid Society, based in New York City, is a private, nonprofit law office dedicated since 1876 to providing legal representation to persons who cannot afford a lawyer. It may well be the oldest formally organized legal aid society in the United States. It enjoys a wide reputation for the devotion of its staff and the quality of its service. We are told that some three-fourths of the budget of its Civil Division is funded by nongovernmental contributors. See The Legal Aid Society 1983 Annual Report 49–52.

[4] Ann Moynihan billed 487 hours and 50 minutes at $95 per hour. 512 F. Supp. 680, 682 (1981). She graduated from law school in 1977, and at the outset of this litigation, she had 1½ years of experience as a practicing attorney. App. 320–321. Paula Galowitz billed 166 hours and 15 minutes at $100 per hour. 512 F. Supp., at 682. She graduated from law school in 1976 and served as a law clerk to a state judge during her first year after graduation. She had 1½ years of experience as a practicing attorney at the Legal Aid Society at the outset of this litigation. App. 335. Arthur Fried billed 155 hours and 40 minutes at $105 per hour. 512 F. Supp., at 682. (The parties agree that the 115 hours noted in the District Court's

Petitioner submitted no evidence to support her claim that the hours and rates charged by respondent were unreasonable. Instead, petitioner rested her claim that the hours were duplicative and excessive and the rates exorbitant on arguments contained in her brief to the District Court and on that court's discretion. Petitioner requested an evidentiary hearing on the issue of reasonable billable hours only if the District Court found that the discussion in her brief did not justify reductions in the number of hours charged. Finally, petitioner argued that the 50% "bonus" requested by respondent was improper because it would be paid by the public.

The District Court held that both the hours expended and the rates charged were reasonable. It also held that the fee calculated by multiplying the number of hours times the hourly rates should be increased by the requested 50% because of the quality of representation, the complexity of the issues, the riskiness of success, and the "great benefit to a large class" that was achieved. 512 F. Supp. 680, 685 (1981). The District Court awarded the plaintiff class the requested fee of $118,968.

The Court of Appeals affirmed in an unpublished opinion. No. 81-7385 (CA2, Oct. 19, 1981). Affirmance order, 671

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table is a typographical error.) He graduated from law school in 1975 and served as a law clerk to a United States District Court Judge for the first two years thereafter. He had 1½ years experience as a practicing attorney at the Legal Aid Society at the outset of litigation. App. 308-309.

F. 2d 493 (1981). We granted certiorari to consider whether it was proper for the District Court to use prevailing market rates in awarding attorney's fees to nonprofit legal services organizations and whether the District Court abused its discretion in increasing the fee award above that based on market rates. 461 U. S. 956 (1983).[5]

II

Petitioner argues that the use of prevailing market rates to calculate attorney's fees under § 1988 leads to exorbitant fee awards and provides windfalls to civil rights counsel contrary to the express intent of Congress. To avoid this result, petitioner urges this Court to require that all fee awards under § 1988 be calculated according to the cost of providing legal services rather than according to the prevailing market rate.[6] The Solicitor General, for the United States as *amicus curiae*, urges the Court to adopt a cost-related standard only for fee awards made to nonprofit legal aid organizations. He argues that market rates reflect the level of compensation necessary to attract profit-making attorneys, but that such rates provide excessive fees to nonprofit counsel. Because market rates incorporate operating expenses that may exceed the expenses of nonprofit legal services organizations, and include an element of profit unnecessary to attract nonprofit counsel, the Solicitor General argues that fee awards based on market rates "confer an unjustified windfall or subsidy upon legal services organizations." Brief for United States as *Amicus Curiae* 6.

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[5] Petitioner does not renew here her argument that the hourly rates claimed by respondent's counsel were out of line with the "prevailing market rate" for private counsel of comparable experience, skill, and reputation. Petitioner claims only that hourly rates for § 1988 fee awards should be based on cost rather than on prevailing market rates. See Brief for Petitioner 12–13, 15–21. We decline to consider petitioner's further argument that the hours charged by respondent's counsel were unreasonable. As noted above, petitioner failed to submit to the District Court any evidence challenging the accuracy and reasonableness of the hours charged, see *Hensley* v. *Eckerhart*, 461 U. S. 424, 437, and n. 12 (1983), or the facts asserted in the affidavits submitted by respondent's counsel. She therefore waived her right to an evidentiary hearing in the District Court. See *City of Detroit* v. *Grinnell Corp.*, 495 F. 2d 448, 472–473 (CA2 1974) (where facts are disputed, an evidentiary hearing is required before a district court determines a proper attorney's fee award). In view of the trial strategy she chose, petitioner waived her right to challenge in this Court the District Court's determination that the number of hours billed were reasonable for cases of similar complexity.

[6] Petitioner specifically proposes that fees be based on "the cost of providing [legal] services plus, where appropriate, a margin for profit." Brief for Petitioner 17.

Resolution of these two arguments begins and ends with an interpretation of the attorney's fee statute. The Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, 42 U. S. C. § 1988 (1976 ed., Supp. V), authorizes district courts to award a reasonable attorney's fee to prevailing civil rights litigants.[7] In enacting the statute, Congress directed that attorney's fees be calculated according to standards currently in use under other fee-shifting statutes:

> "It is intended that the amount of fees awarded under [§ 1988] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases[,] and not be reduced because the rights involved may be nonpecuniary in nature. The appropriate standards, see *Johnson* v. *Georgia Highway Express*, 488 F. 2d 714 (5th Cir. 1974), are correctly applied in such cases as *Stanford Daily* v. *Zurcher*, 64 F. R. D. 680 (N. D. Cal. 1974); *Davis* v. *County of Los Angeles*, 8 E. P. D. ¶ 9444 (C. D. Cal. 1974); and *Swann* v. *Charlotte-Mecklenburg Board of Education*, 66 F. R. D. 483 (W. D. N. C. 1975). These cases have resulted in fees which are adequate to attract competent

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[7] Section 1988 provides in relevant part:

"In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title . . . , the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

> counsel, but which do not produce windfalls to attorneys." S. Rep. No. 94–1011, p. 6 (1976).[8]

In all four of the cases cited by the Senate Report, fee awards were calculated according to prevailing market rates.[9] None of these four cases made any mention of a cost-based standard.[10] Petitioner's argument that the use of market rates violates congressional intent, therefore, is flatly contradicted by the legislative history of § 1988.

It is also clear from the legislative history that Congress did not intend the calculation of fee awards to vary depending on whether plaintiff was represented by private counsel or by a nonprofit legal services organization. The citations to *Stanford Daily* v. *Zurcher*, 64 F. R. D. 680 (ND Cal. 1974), and *Davis* v. *County of Los Angeles*, 8 EPD ¶ 9444 (CD Cal.

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[8] Accord H. R. Rep. No. 94–1558, p. 8 (1976).

[9] See *Johnson* v. *Georgia Highway Express, Inc.*, 488 F. 2d 714, 718 (CA5 1974) ("The customary fee for similar work in the community should be considered"); *Stanford Daily* v. *Zurcher*, 64 F. R. D. 680, 682 (ND Cal. 1974) ("[In making the fee award,] the court will consider . . . the value of the [attorney's] time in light of billing rates . . ."); *Davis* v. *County of Los Angeles*, 8 EPD ¶ 9444, at 5048 (CD Cal. 1974) (fee award calculated by multiplying number of hours expended times the "normal hourly rates" for attorneys of like skill and experience); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 66 F. R. D. 483, 486 (WDNC 1975) (fee award calculated with reference to hourly rates generally charged in federal litigation).

[10] Congress was legislating in light of experience when it enacted the 1976 fee statute. By that time, courts were familiar with calculating fee awards for civil litigation under Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e–5(k), and under the judicially established "private attorney general" theory that had prevailed prior to this Court's decision in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240 (1975). None of the cases decided at that time had adopted a cost-based approach to calculating fees. Reference to market rate was uniform. See, *e. g.*, *Waters* v. *Wisconsin Steel Works*, 502 F. 2d 1309, 1322 (CA7 1974), cert. denied, 425 U. S. 997 (1976); *Evans* v. *Sheraton Park Hotel*, 164 U. S. App. D. C. 86, 96, 503 F. 2d 177, 187 (1974); *Tillman* v. *Wheaton-Haven Recreation Assn., Inc.*, 517 F. 2d 1141, 1148 (CA4 1975); *Kerr* v. *Screen Extras Guild, Inc.*, 526 F. 2d 67, 69–70 (CA9 1975), cert. denied *sub nom.* *Perkins* v. *Screen Extras Guild, Inc.*, 425 U. S. 951 (1976).

1974), make this explicit. In *Stanford Daily*, the court held that it "must avoid . . . decreasing reasonable fees because the attorneys conducted the litigation more as an act of pro bono publico than as an effort at securing a large monetary return." 64 F. R. D., at 681. In *Davis*, the court held:

> "In determining the amount of fees to be awarded, it is not legally relevant that plaintiffs' counsel . . . are employed by . . . a privately funded non-profit public interest law firm. It is in the interest of the public that such law firms be awarded reasonable attorneys' fees to be computed in the traditional manner when its counsel perform legal services otherwise entitling them to the award of attorneys' fees." 8 EPD, at 5048–5049.

We cannot assume that Congress would endorse the standards used in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F. 2d 714 (CA5 1974), *Stanford Daily*, *Davis*, and *Swann* v. *Charlotte-Mecklenburg Board of Education*, 66 F. R. D. 483 (WDNC 1975), if fee awards based on market rates were viewed as the kind of "windfall profits" it expressly intended to prohibit.

The statute and legislative history establish that "reasonable fees" under § 1988 are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel.[11] The policy arguments advanced in favor of a cost-based standard should be addressed to Congress rather than to this Court.

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[11] We recognize, of course, that determining an appropriate "market rate" for the services of a lawyer is inherently difficult. Market prices of commodities and most services are determined by supply and demand. In this traditional sense there is no such thing as a prevailing market rate for the service of lawyers in a particular community. The type of services rendered by lawyers, as well as their experience, skill, and reputation, varies extensively—even within a law firm. Accordingly, the hourly rates of lawyers in private practice also vary widely. The fees charged often are based on the product of hours devoted to the representation multiplied by the lawyer's customary rate. But the fee usually is discussed with the client, may be negotiated, and it is the client who pays whether he wins or loses. The § 1988 fee determination is made by the court in an entirely

III

We address now the second question presented: whether a 50% upward adjustment in the fee was—as petitioner argues—an abuse of discretion by the District Court.[12] Petitioner makes two separate but related arguments. First, she asserts that a reasonable attorney's fee is calculated by multiplying the reasonable number of hours expended times a reasonable hourly rate and that any upward adjustment of that fee is improper. In the alternative, she argues that the 50% upward adjustment in this case constitutes a clear abuse of discretion.

A

Where, as here, resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear. In actions to enforce federal civil rights, § 1988 authorizes a court, "in its discretion,"

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different setting: there is no negotiation or even discussion with the prevailing client, as the fee—found to be reasonable by the court—is paid by the losing party. Nevertheless, as shown in the text above, the critical inquiry in determining reasonableness is now generally recognized as the appropriate hourly rate. And the rates charged in private representations may afford relevant comparisons.

In seeking some basis for a standard, courts properly have required prevailing attorneys to justify the reasonableness of the requested rate or rates. To inform and assist the court in the exercise of its discretion, the burden is on the fee applicant to produce satisfactory evidence—in addition to the attorney's own affidavits—that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation. A rate determined in this way is normally deemed to be reasonable, and is referred to—for convenience—as the prevailing market rate.

[12] The District Court characterized the 50% increase as a "bonus." The Court of Appeals, in its brief opinion, spoke of it as an "upward adjustment." As we think the latter characterization is fairer, we will use it.

to "allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." The legislative history explains that "a reasonable attorney's fee" is one that is "adequate to attract competent counsel, but . . . [that does] not produce windfalls to attorneys." S. Rep. No. 94–1011, p. 6 (1976). As noted, the Senate Report identified four cases that had calculated correctly a reasonable attorney's fee.[13]

In *Hensley* v. *Eckerhart*, 461 U. S. 424 (1983), we reviewed the cases cited in the legislative history of § 1988 and concluded that the "product of reasonable hours times a reasonable rate" normally provides a "reasonable" attorney's fee within the meaning of the statute. *Id.*, at 434. *Hensley* also recognized that "in some cases of exceptional success an enhanced award may be justified." *Id.*, at 435.[14] In view of our recognition that an enhanced award may be justified "in some cases of exceptional success," we cannot agree with petitioner's argument that an "upward adjustment" is never permissible. The statute requires a "reasonable fee," and there may be circumstances in which the basic standard of reasonable rates multiplied by reasonably expended hours results in a fee that is either unreasonably low or unreasonably high. When, however, the applicant for a fee has carried his burden of showing that the claimed rate and number of hours are reasonable, the resulting product is presumed to be the reasonable fee contemplated by § 1988.

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[13] Specifically, the Senate Report expressly approved the 12 factors that the Court of Appeals for the Fifth Circuit had used in calculating a fee award in *Johnson* v. *Georgia Highway Express, Inc.*, 488 F. 2d 714 (1974). It then identified three cases as having "correctly applied" those 12 factors. See *supra*, at 893–894.

[14] At another point in *Hensley*, the Court observed that the "product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the 'results obtained.'" 461 U. S., at 434.

B

The issue remaining is the appropriateness of an upward adjustment to the fee award in this case. The burden of proving that such an adjustment is necessary to the determination of a reasonable fee is on the fee applicant. The record before us contains no evidence supporting an upward adjustment to fees calculated under the basic standard of reasonable rates times reasonable hours. The affidavits of respondent's attorneys do not claim, or even mention, entitlement to a bonus or upward revision. Respondent's brief to the District Court merely states in conclusory fashion that an upward adjustment to the fee is necessary because the issues were novel, the litigation was complex, and the results were of far-reaching significance to a large class of people. The District Court, without elaboration, accepted these conclusory reasons for approving the upward adjustment and supplied additional reasons of its own. In awarding the 50% increase, the court referred to the complexity of the litigation, the novelty of the issues, the high quality of representation, the "great benefit" to the class, and the "riskiness" of the lawsuit. The Court of Appeals, in affirming, shed no light on why it thought this substantial upward adjustment was appropriate. In a single sentence, it simply repeated the unsupported conclusions of the District Court.

The reasons offered by the District Court to support the upward adjustment do not withstand examination. The novelty and complexity of the issues presumably were fully reflected in the number of billable hours recorded by counsel and thus do not warrant an upward adjustment in a fee based on the number of billable hours times reasonable hourly rates. There may be cases, of course, where the experience and special skill of the attorney will require the expenditure of fewer hours than counsel normally would be expected to spend on a particularly novel or complex issue. In those cases, the special skill and experience of counsel should be reflected in the reasonableness of the hourly rates. Neither complexity nor novelty of the issues, therefore, is an appropriate factor in determining whether to increase the basic fee award.

The District Court, having tried the case, was in the best position to conclude that "the quality of representation was high." In view of the reputation of the Legal Aid Society and its staff, we have no doubt that this was true.[15] The "quality of representation," however, generally is reflected in the reasonable hourly rate. It, therefore, may justify an upward adjustment only in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was "exceptional." See *Hensley*, 461 U. S., at 435. Respondent offered no such evidence in this case, and on this record the District Court's rationale for providing an upward adjustment for quality of representation is a clear example of double counting. In justifying the high hourly rates used to calculate the fee award, the District Court explained:

> "The rates requested here are consonant with fee awards in cases of similar complexity and difficulty. . . . [T]hey are fair in view of these attorneys['] experience and expertise . . . . The quality of work performed by counsel throughout this case was high. In view of all these considerations, I do not find the requested rates, from $95 per hour to $105 per hour, excessive." 512 F. Supp., at 683.

In justifying the upward adjustment to the fee award, the District Court merely restated these same two factors: "The quality of representation was high. The litigation was complex." *Id.*, at 685.

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[15] Each of respondent's counsel had admirable records as scholars, and two had valuable clerkship experience. They also were specializing in social security type claims against the Government. Yet none of them, at the outset of this suit in December 1978, had more than 1½ years' experience as practicing lawyers. See n. 4, *supra*. As the term "experience" normally is used, this is quite limited.

Not only has respondent failed to show that the hourly rates failed to provide a reasonable fee for the quality of representation provided, but she candidly concedes that the "fees awarded [to her attorneys] may be at the upper end of the market for awards under § 1988 . . . ." Brief for Respondent 42. Absent specific evidence to the contrary, we cannot say that rates from $95 per hour to $105 per hour for these three attorneys do not fully reflect the quality of their representation.

The 50% upward adjustment also was based in part on the District Court's determination that the ultimate outcome of the litigation "was of great benefit to a large class of needy people." 512 F. Supp., at 685. The court did not explain, however, exactly how this determination affected the fee award. "Results obtained" is one of the 12 factors identified in *Johnson* v. *Georgia Highway Express*, 488 F. 2d, at 718, as relevant to the calculation of a reasonable attorney's fee. It is "particularly crucial where a plaintiff is deemed 'prevailing' even though he succeeded on only some of his claims for relief." *Hensley*, *supra*, at 434 (fee award must be reduced by the number of hours spent on unsuccessful claims). Because acknowledgment of the "results obtained" generally will be subsumed within other factors used to calculate a reasonable fee, it normally should not provide an independent basis for increasing the fee award.[16] Neither the District Court's opinion nor respondent's briefs have identified record evidence that shows that the benefit achieved requires an upward adjustment to the fee.

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[16] Nor do we believe that the *number* of persons benefited is a consideration of significance in calculating fees under § 1988. Unlike the calculation of attorney's fees under the "common fund doctrine," where a reasonable fee is based on a percentage of the fund bestowed on the class, a reasonable fee under § 1988 reflects the amount of attorney time reasonably expended on the litigation. Presumably, counsel will spend as much time and will be as diligent in litigating a case that benefits a small class of people, or, indeed, in protecting the civil rights of a single individual.

Finally, the District Court included among its reasons for an upward adjustment a statement that the "issues presented were novel and the undertaking therefore risky." 512 F. Supp., at 685. Absent any claim in the affidavits or briefs submitted in support of respondent's fee request, seeking such an adjustment, we cannot be sure what prompted the court's statement. Nowhere in the affidavits submitted in support of respondent's fee request, nor in her brief to the District Court, did respondent identify any risks associated with the litigation or claim that the risk of nonpayment required an upward adjustment to provide a reasonable fee. On this record, therefore, any upward adjustment for the contingent nature of the litigation was unjustified.[17]

In sum, we reiterate what was said in *Hensley:* "Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified." 461 U. S., at 435. We therefore reject petitioner's argument that an upward adjustment to an attorney's fee is never appropriate under § 1988.[18] On the record before us, however, respondent established only that hourly rates ranging from $95 per hour to $105 per hour for the full 809.75 hours billed were reasonable. This resulted in a charge of $79,312. Respondent introduced no evidence that enhancement was necessary to provide fair and reasonable compensation. She therefore has failed to carry her burden of justifying entitlement to an upward adjustment.[19] On this record, we conclude that the fee of $79,312 was "fully compensatory." Accordingly, the judgment below is reversed only insofar as the fee award was increased by the sum of $39,656, and is otherwise affirmed.

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[17] We have no occasion in this case to consider whether the risk of not being the prevailing party in a § 1983 case, and therefore not being entitled to an award of attorney's fees from one's adversary, may ever justify an upward fee adjustment.

[18] In Part II of this opinion, we declined to draw a distinction with respect to the use of market rates between profit and nonprofit law offices. Similarly, in the rare case in which an upward adjustment to the presumptively reasonable fee of rate times hours is appropriate, we draw no distinction between profit and nonprofit law offices.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring.

I join the Court's opinion. I write separately only to reaffirm my view that Congress has clearly indicated that the risk of not prevailing, and therefore the risk of not recovering any attorney's fees, is a proper basis on which a district court may award an upward adjustment to an otherwise compensatory fee. See *Hensley* v. *Eckerhart*, 461 U. S. 424, 448–449 (1983) (BRENNAN, J., concurring in part and dissenting in part).

Although the Court leaves the question unresolved, see *ante*, at 901, n. 17, the legislative history that always has controlled our interpretation of § 1988, and that proves determinative on the other issues addressed by today's decision, also determines whether an upward adjustment to compensate for the risk of nonpayment may be justified. In particular, Congress referred to *Johnson* v. *Georgia Highway Express, Inc.*, 488 F. 2d 714 (CA5 1974), for the appropriate standards to be applied by courts awarding attorney's fees under § 1988. See *ante*, at 893–896. "*Whether the fee is fixed or contingent,*" 488 F. 2d, at 718 (emphasis in original), was consequently recognized by Congress as a relevant consideration in setting a reasonable fee. Moreover, Congress explicitly cited *Stanford Daily* v. *Zurcher*, 64 F. R. D. 680 (ND Cal. 1974) (subsequently aff'd, 550 F. 2d 464 (CA9 1977), rev'd on other grounds, 436 U. S. 547 (1978)), as one of several cases that had "correctly applied" the appropriate standards. S. Rep. No. 94–1011, p. 6 (1976). In *Stanford Daily*, the District Court concluded that a court may "increase the fees award obtained by multiplying the number of hours by the average billing rate to reflect the fact that the attorneys' compensation, at least in part, was contingent in nature." 64 F. R. D., at 685–686. It is clear, therefore, that Congress authorized district courts to award upward adjustments to compensate for the contingent nature of success, and thus for the risk of nonpayment in a particular case.

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[19] As we stated in *Hensley*, a "request for attorney's fees should not result in a second major litigation." *Hensley*, 461 U. S., at 437. Parties to civil rights litigation in particular should make a conscientious effort, where a fee award is to be made, to resolve any differences. A district court is expressly empowered to exercise discretion in determining whether an award is to be made and if so its reasonableness. The court, with its intimate knowledge of the litigation, has a responsibility to encourage agreement.

Indeed, allowing district courts to award such upward adjustments is entirely consistent with the market-based approach to hourly rates that is today reaffirmed by the Court. Lawyers operating in the marketplace can be expected to charge a higher hourly rate when their compensation is contingent on success than when they will be promptly paid, irrespective of whether they win or lose. Similarly, it is necessary to account for this risk in fee awards under § 1988, either by increasing the appropriate hourly rate or by enhancing the fee otherwise calculated with the use of an hourly rate that does not reflect the risk of not prevailing.* This will ensure that fees under § 1988 are consistent with prevailing market rates, see *ante*, at 893–894, and n. 9, that nonprofit legal service organizations and private attorneys are treated similarly, see *ante*, at 894–895, and n. 18, and that the attorney's fees awarded are "adequate to attract competent counsel" to represent other clients with civil rights grievances, S. Rep. No. 94–1011, p. 6 (1976); H. R. Rep. No. 94–1558, p. 9 (1976).

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*Contingency adjustments under § 1988 should not be confused with contingency fee arrangements that are commonly entered into by private attorneys representing plaintiffs in civil litigation. An upward adjustment to compensate for the risk of nonpayment under § 1988 is "entirely unrelated to the 'contingent fee' arrangements that are typical in plaintiffs' tort representation. In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery. Such is not the case in contingency adjustments of the kind . . . describe[d] herein. Th[is] contingency adjustment is a percentage increase in the [amount obtained by multiplying

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hours expended by hourly rate, and is designed] to reflect the risk that no fee will be obtained." *Copeland* v. *Marshall*, 205 U. S. App. D. C. 390, 403, 641 F. 2d 880, 893 (1980) (en banc).

REPORTER'S NOTE

The next page is purposely numbered 1001. The numbers between 904 and 1001 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

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ORDERS FROM JANUARY 23 THROUGH MARCH 23, 1984

JANUARY 23, 1984

Appeals Dismissed

No. 83–593. ELLSWORTH FREIGHT LINES, INC., ET AL. *v.* STATE TAX COMMISSION OF MISSOURI. Appeal from Sup. Ct. Mo. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 651 S. W. 2d 130.

No. 83–5830. POINTON ET AL. *v.* FIDELITY NATIONAL BANK, N. A. Appeal from C. A. 10th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 83–5948. VELASQUEZ *v.* COLORADO. Appeal from Sup. Ct. Colo. dismissed for want of substantial federal question. Reported below: 666 P. 2d 567.

Certiorari Granted—Vacated and Remanded

No. 81–2065. VAN DISSEL ET AL. *v.* JERSEY CENTRAL POWER & LIGHT CO. Super. Ct. N. J., App. Div. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Silkwood* v. *Kerr-McGee Corp.*, 464 U. S. 238 (1984). Reported below: 181 N. J. Super. 516, 438 A. 2d 563.

No. 82–1592. WEISS, CUSTODIAN FOR WEISS *v.* TEMPORARY INVESTMENT FUND, INC., ET AL. C. A. 3d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Daily Income Fund, Inc.* v. *Fox*, 464 U. S. 523 (1984). Reported below: 692 F. 2d 928.

No. 82–1873. COMMISSIONER OF INTERNAL REVENUE *v.* DOWELL ET UX. C. A. 10th Cir. Certiorari granted, judgment vacated, and case remanded without prejudice to the respondents to raise the issue of the jurisdiction of the Court of Appeals to review the judgment of the Tax Court. JUSTICE STEVENS would deny certiorari.

No. 82–1877. IMMIGRATION AND NATURALIZATION SERVICE *v.* LITONJUA ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Mendoza,* 464 U. S. 154 (1984). Reported below: 694 F. 2d 603.

No. 82–2117. CONNECTICUT *v.* SCHONAGEL. Sup. Ct. Conn. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Michigan* v. *Clifford,* 464 U. S. 287 (1984). Reported below: 189 Conn. 752, 459 A. 2d 106.

No. 83–5165. ZEISLER *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Michigan* v. *Clifford,* 464 U. S. 287 (1984). Reported below: 112 Ill. App. 3d 788, 445 N. E. 2d 1324.

Miscellaneous Orders

No. — — ——. SAYLES *v.* GESELL, JUDGE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA. Motion to direct the Clerk to file the petition for writ of certiorari out of time denied.

No. D–373. IN RE DISBARMENT OF PERRI. Disbarment entered. [For earlier order herein, see 464 U. S. 926.]

No. D–387. IN RE DISBARMENT OF MANDELL. Disbarment entered. [For earlier order herein, see 464 U. S. 958.]

No. D–396. IN RE DISBARMENT OF MCMORRIS. It is ordered that Samuel McMorris, of Oakland, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–397. IN RE DISBARMENT OF BERGMAN. It is ordered that Laurence Edgar Bergman, of Ft. Collins, Colo., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 81–1109. ROBERT W. KIRK & ASSOCIATES, INC. *v.* HOLCOMB ET AL., 459 U. S. 1170. Motion of respondent Holcomb to set time for filing attorney's fee application is denied without prejudice to applying for the relief in the United States Court of Appeals for the Eleventh Circuit.

No. 82-1795. CAPITAL CITIES CABLE, INC., ET AL. *v.* CRISP, DIRECTOR, OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD. C. A. 10th Cir. [Certiorari granted, 464 U. S. 813.] Motion of petitioners Cox Cable of Oklahoma City, Inc., et al. for assignment of counsel for oral argument denied.

No. 83-245. PENSION BENEFIT GUARANTY CORPORATION *v.* R. A. GRAY & CO.; and

No. 83-291. OREGON-WASHINGTON CARPENTERS-EMPLOYERS PENSION TRUST FUND *v.* R. A. GRAY & CO. C. A. 9th Cir. [Probable jurisdiction noted, 464 U. S. 912.] Motions for leave to file briefs as *amici curiae* in No. 83-291 by the following were granted: National-American Wholesale Grocers' Association, Chamber of Commerce of the United States of America, Transport Motor Express, Inc., et al., G & R Roofing Co., Sibley, Lindsay & Curr Co., and Republic Industries, Inc.

No. 83-328. MABRY, COMMISSIONER, ARKANSAS DEPARTMENT OF CORRECTION *v.* JOHNSON. C. A. 8th Cir. [Certiorari granted, 464 U. S. 1017.] Motion for appointment of counsel granted, and it is ordered that Richard Quiggle, Esquire, of Little Rock, Ark., be appointed to serve as counsel for respondent in this case.

No. 83-498. BROWN, DIRECTOR, DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF NEW JERSEY, ET AL. *v.* HOTEL & RESTAURANT EMPLOYEES & BARTENDERS INTERNATIONAL UNION LOCAL 54 ET AL.; and

No. 83-573. DANZIGER, ACTING CHAIRMAN, CASINO CONTROL COMMISSION OF NEW JERSEY, ET AL. *v.* HOTEL & RESTAURANT EMPLOYEES & BARTENDERS INTERNATIONAL UNION LOCAL 54 ET AL. C. A. 3d Cir. [Probable jurisdiction noted, 464 U. S. 990.] Motion of Atlantic City Casino Hotel Association et al. for leave to file a brief as *amici curiae* in No. 83-573 granted.

No. 83-690. MUSTO ET AL. *v.* UNITED STATES. C. A. 3d Cir. Motion of petitioners to consolidate case with No. 82-2140, *Hobby* v. *United States* [certiorari granted, 464 U. S. 1017], denied.

No. 83-712. NEW JERSEY *v.* T. L. O. Sup. Ct. N. J. [Certiorari granted, 464 U. S. 991.] Motions of National School Boards Association, Washington Legal Foundation, and New Jersey School Boards Association for leave to file briefs as *amici curiae* granted.

No. 83-5867. CARSTEA ET AL. *v.* POPLAR TREE HOMEOWNERS ASSN. Sup. Ct. Va.; and

No. 83-5868. CARSTEA *v.* POPLAR TREE HOMEOWNERS ASSN. Sup. Ct. Va. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until February 13, 1984, within which to pay the docketing fee required by Rule 45(a) and to submit petitions in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petitions for certiorari in these cases without reaching the merits of the motions to proceed *in forma pauperis*.

No. 83-899. IN RE RONWIN. Petition for writ of mandamus denied. JUSTICE REHNQUIST and JUSTICE O'CONNOR took no part in the consideration or decision of this petition.

Certiorari Granted

No. 83-614. SECURITIES INDUSTRY ASSN. *v.* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 716 F. 2d 92.

No. 83-916. UNITED STATES *v.* MORTON. C. A. Fed. Cir. Certiorari granted. Reported below: 708 F. 2d 680.

No. 83-904. OHIO *v.* JOHNSON. Sup. Ct. Ohio. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 6 Ohio St. 3d 420, 453 N. E. 2d 595.

Certiorari Denied. (See also Nos. 83-593 and 83-5830, *supra*.)

No. 82-2008. NESMITH *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 699 F. 2d 712.

No. 82-6758. TURNER *v.* COUNTY OF SISKIYOU ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 83-204. JARRETT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 705 F. 2d 198.

No. 83-258. DIAMOND *v.* FEDERAL BUREAU OF INVESTIGATION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 707 F. 2d 75.

No. 83-383. FLORIDA *v.* DECONINGH. Sup. Ct. Fla. Certiorari denied. Reported below: 433 So. 2d 501.

No. 83-454. GLICK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 710 F. 2d 639.

No. 83-494. WALKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 710 F. 2d 1062.

No. 83-499. MARCUS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 720 F. 2d 669.

No. 83-508. FOOD LION, INC. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 708 F. 2d 920.

No. 83-513. RECORD DATA, INC. *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA (NEAL ET AL., REAL PARTIES IN INTEREST). C. A. 11th Cir. Certiorari denied. Reported below: 710 F. 2d 838.

No. 83-585. CAUBLE, DBA CAUBLE ENTERPRISES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 706 F. 2d 1322.

No. 83-600. APKER ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 705 F. 2d 293.

No. 83-641. BRISTOL CORP., DBA FEY MANUFACTURING CORP. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 714 F. 2d 151.

No. 83-658. HALBERT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 712 F. 2d 388.

No. 83-672. ALTHISER ET AL. *v.* NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 711 F. 2d 1117.

No. 83-674. MANN ET AL. *v.* FEDERAL CROP INSURANCE CORPORATION. C. A. 4th Cir. Certiorari denied. Reported below: 710 F. 2d 144.

No. 83-676. SAM RAYBURN DAM ELECTRIC COOPERATIVE, INC. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 712 F. 2d 1414.

No. 83-691. ALUEVICH *v.* HARRAH'S ET AL. Sup. Ct. Nev. Certiorari denied. Reported below: 99 Nev. 215, 660 P. 2d 986.

No. 83-719. DURO *v.* DISTRICT ATTORNEY, SECOND JUDICIAL DISTRICT OF NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 712 F. 2d 96.

No. 83-730. WATER TRANSPORT ASSN. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 230 U. S. App. D. C. 107, 715 F. 2d 581.

No. 83-736. CLIFFORD ET AL. *v.* GRUTKA. Ct. App. Ind. Certiorari denied. Reported below: 445 N. E. 2d 1015.

No. 83-758. GARCIA ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 714 F. 2d 110.

No. 83-781. TILTON ET AL. *v.* JEFFERSON COUNTY BOARD OF EDUCATION ET AL.; and

No. 83-893. JEFFERSON COUNTY BOARD OF EDUCATION ET AL. *v.* TILTON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 705 F. 2d 800.

No. 83-840. GEORGIA-PACIFIC CORP. *v.* BOYKIN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 706 F. 2d 1384.

No. 83-846. CONNECTICUT *v.* THOMPSON ET AL. Sup. Ct. Conn. Certiorari denied. Reported below: 191 Conn. 360, 464 A. 2d 799.

No. 83-862. AMMONS *v.* BALDWIN. C. A. 5th Cir. Certiorari denied. Reported below: 705 F. 2d 1445.

No. 83-868. PALMER *v.* CITY OF SEATTLE. Ct. App. Wash. Certiorari denied.

No. 83-869. TEAT *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 437 So. 2d 1143.

No. 83-873. SORRELS *v.* J. RAY MCDERMOTT, INC. C. A. 5th Cir. Certiorari denied. Reported below: 715 F. 2d 575.

No. 83-878. HADLEY *v.* COUNTY OF DU PAGE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 715 F. 2d 1238.

No. 83-882. MISKOVSKY *v.* TULSA TRIBUNE CO. ET AL. Sup. Ct. Okla. Certiorari denied. Reported below: 678 P. 2d 242.

No. 83-883. MISKOVSKY *v.* WORLD PUBLISHING CO. ET AL. Sup. Ct. Okla. Certiorari denied.

No. 83-884. MCKASKLE, ACTING DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS *v.* PLUNKETT. C. A. 5th Cir. Certiorari denied. Reported below: 709 F. 2d 1004.

No. 83-887. JACKSON *v.* CONSOLIDATED RAIL CORPORATION. C. A. 7th Cir. Certiorari denied. Reported below: 717 F. 2d 1045.

No. 83-895. PEARSON *v.* COLUMBIA BRIARGATE CO. C. A. 4th Cir. Certiorari denied. Reported below: 713 F. 2d 1052.

No. 83-896. SHIVELY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 715 F. 2d 260.

No. 83-913. KROGUL *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 115 Ill. App. 3d 734, 450 N. E. 2d 20.

No. 83-917. KROOG *v.* MAIT ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 712 F. 2d 1148.

No. 83-923. MARTIN *v.* ALASKA; and OLSON *v.* ALASKA. Ct. App. Alaska. Certiorari denied. Reported below: 664 P. 2d 612 (first case).

No. 83-928. MCGAUGHEY, AKA ZIGORIS, ET AL. *v.* ZIGORIS. Sup. Ct. Ky. Certiorari denied.

No. 83-934. GREGER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 716 F. 2d 1275.

No. 83-957. YARD-MAN, INC. *v.* INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 716 F. 2d 1476.

No. 83-961. SCHELLONG *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 717 F. 2d 329.

No. 83-964. SMITH *v.* CONNER, JUDGE, UNITED STATES DISTRICT COURT, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 83-966. FAITH CENTER, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION. C. A. D. C. Cir. Certiorari denied.

No. 83-970. PIANKO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 720 F. 2d 680.

No. 83-974. DOUGLAS *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 4th Cir. Certiorari denied. Reported below: 714 F. 2d 129.

No. 83-987. BALL ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 714 F. 2d 154.

No. 83-999. GAUDIO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 718 F. 2d 1105.

No. 83-1001. ROBINSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 700 F. 2d 205 and 713 F. 2d 110.

No. 83-1029. TAKAHASHI *v.* GOVERNING BOARD OF THE LIVINGSTON UNION SCHOOL DISTRICT ET AL. Ct. App. Cal., 5th App. Dist. Certiorari denied. Reported below: 144 Cal. App. 3d 27, 192 Cal. Rptr. 358.

No. 83-5324. GREENE *v.* GOVERNMENT OF THE VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. Reported below: 708 F. 2d 113 and 712 F. 2d 824.

No. 83-5377. WILKINS *v.* LYLES, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 716 F. 2d 899.

No. 83-5388. MARENO *v.* RE, CHIEF JUDGE, UNITED STATES COURT OF INTERNATIONAL TRADE. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1430.

No. 83-5403. PUSSAY *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 83-5472. TRIGNANI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 720 F. 2d 669.

No. 83-5475. BLYTHER *v.* SUPERIOR COURT OF THE DISTRICT OF COLUMBIA ET AL. Ct. App. D. C. Certiorari denied.

No. 83-5501. DILLON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 714 F. 2d 125.

No. 83-5525. WAGES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 716 F. 2d 905.

No. 83-5527. BALDWIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1509.

No. 83-5538. GIVENS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 712 F. 2d 1298.

No. 83-5553. LOPATA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 720 F. 2d 669.

No. 83-5579. GLOVER *v.* MCKASKLE, ACTING DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 83-5602. JOHNSON *v.* MCKASKLE, ACTING DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 704 F. 2d 232.

No. 83-5625. HERNANDEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 715 F. 2d 548.

No. 83-5696. CAULTON *v.* HOSPITAL OF THE GOOD SAMARITAN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 711 F. 2d 1062.

No. 83-5697. BRYANT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 716 F. 2d 1091.

No. 83-5718. HENDERSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 717 F. 2d 135.

No. 83-5739. BENNETT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 720 F. 2d 684.

No. 83-5750. MOORE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 722 F. 2d 736.

No. 83-5765. JOHNS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 83-5794. BEARD *v.* OHIO. Ct. App. Ohio, Butler County. Certiorari denied.

No. 83-5802. MILBURN *v.* TEXAS. Ct. App. Tex., 2d Sup. Jud. Dist. Certiorari denied.

No. 83-5807. WIDEMAN *v.* BUTTERWORTH, WARDEN. C. A. 1st Cir. Certiorari denied. Reported below: 725 F. 2d 664.

No. 83-5810. THOMAS *v.* TORRES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 717 F. 2d 248.

No. 83-5813. MCMILLION *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied. Reported below: 718 F. 2d 1092.

No. 83-5816. GALLAGHER ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 720 F. 2d 668.

No. 83-5823. BROXSON *v.* FLORIDA PAROLE AND PROBATION COMMISSION ET AL. C. A. 11th Cir. Certiorari denied.

No. 83-5838. SCHUSTER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 684 F. 2d 744 and 717 F. 2d 537.

No. 83-5842. FREEMAN *v.* MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY. Sup. Ct. Ohio. Certiorari denied.

No. 83-5850. CARPENTER *v.* TEXAS. Ct. App. Tex., 5th Sup. Jud. Dist. Certiorari denied.

No. 83-5852. SCHANBARGER *v.* THIRD APPELLATE DIVISION OF THE NEW YORK STATE SUPREME COURT. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied.

No. 83-5854. MANGO *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 83-5858. MURCER *v.* JONES, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 83-5859. SANDS *v.* DAVIS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 720 F. 2d 679.

No. 83-5860. SURGEON *v.* MCNAMARA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 714 F. 2d 133.

No. 83-5862. MANKO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 718 F. 2d 1107.

No. 83-5863. PICKARD *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 83-5864. ETCHISON *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 83-5865. ABDULLAH *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 438 So. 2d 831.

No. 83-5873. MAGHE *v.* OKLAHOMA. C. A. 10th Cir. Certiorari denied.

No. 83-5875. HUNTER *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 83-5887. MCALPIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 712 F. 2d 1417.

No. 83-5892. WHIPPLE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 83-5894. PLAGMANN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 722 F. 2d 748.

No. 83-5896. MCQUEEN *v.* CREWS ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 716 F. 2d 913.

No. 83-5901. LEHMER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 83-5903. JONES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 83-5904. KOON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 719 F. 2d 405.

No. 83-5920. RUTH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 718 F. 2d 1104.

No. 83-5922. LEHMER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 83-5925. HUNTER *v.* OHIO. Ct. App. Ohio, Summit County. Certiorari denied.

No. 83-5926. PERDUE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 719 F. 2d 405.

No. 83-5932. LABRUNA *v.* UNITED STATES MARSHAL, WESTERN DISTRICT OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1431.

No. 83-5934. GOOD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 723 F. 2d 897.

No. 83-5937. STAPF *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 722 F. 2d 739.

No. 83-5938. DURHAM-MORGAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 722 F. 2d 748.

No. 83-5950. OSIPOVA *v.* DUDLEY, CHIEF JUSTICE OF THE SUPREME COURT OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1438.

No. 83-5953. DONATE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 719 F. 2d 405.

No. 83-5957. GARRIS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 465 A. 2d 817.

No. 82-1800. CONNECTICUT *v.* ZINDROS. Sup. Ct. Conn. Certiorari denied. THE CHIEF JUSTICE would grant certiorari. Reported below: 189 Conn. 228, 456 A. 2d 288.

No. 83-538. NOVELTIES DISTRIBUTION CORP. ET AL. *v.* MOLEE ET AL. C. A. 3d Cir. Motion of respondent Anthony Molee for approval of attorney's fees is denied without prejudice to applying for the relief in the United States Court of Appeals for the Third Circuit. Certiorari denied. Reported below: 710 F. 2d 992.

No. 83-661. SHOUN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 714 F. 2d 143.

No. 83-678. JOSEPH MAGNIN CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE O'CONNOR would grant certiorari. Reported below: 704 F. 2d 1457.

No. 83-685. MARINE CORPS EXCHANGE ET AL. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL. C. A. 9th Cir. Motion of respondent Elton Morgan for approval of attorney's fees is denied without prejudice to applying for the relief in the United States Court of Appeals for the Ninth Circuit. Certiorari denied. Reported below: 718 F. 2d 1111.

No. 83-877. JOHNSON ET UX., DBA OAK FARM LIVESTOCK ET AL. *v.* FIRST NATIONAL BANK OF MONTEVIDEO, MINNE-

SOTA. C. A. 8th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE BLACKMUN would grant certiorari. Reported below: 719 F. 2d 270.

No. 83-5278. EAGLE ELK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 711 F. 2d 80.

No. 83-5678. HOWZE *v.* MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. JUSTICE MARSHALL would grant certiorari. Reported below: 716 F. 2d 396.

No. 83-5626. O'BRYAN *v.* MCKASKLE, ACTING DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Motion of Washington Legal Foundation for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 714 F. 2d 365.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 83-5735. WILSON *v.* UNITED STATES; and TURNER *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. JUSTICE BLACKMUN would grant certiorari.

No. 83-5815. HARPER *v.* NEBRASKA. Sup. Ct. Neb.;
No. 83-5840. JACKSON *v.* FLORIDA. Sup. Ct. Fla.;
No. 83-5912. HARDING *v.* ARIZONA. Sup. Ct. Ariz.; and
No. 83-5945. MICHAEL *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 83-5815, 214 Neb. 911, 336 N. W. 2d 597; No. 83-5840, 437 So. 2d 147; No. 83-5912, 137 Ariz. 278, 670 P. 2d 383; No. 83-5945, 437 So. 2d 138.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 82-6729. DAVIS *v.* ILLINOIS, 464 U. S. 1001;

No. 83-131. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* GOODE, 464 U. S. 78;

No. 83-555. RUSSELL STOVER CANDIES, INC. *v.* DEPARTMENT OF REVENUE OF MONTANA, 464 U. S. 988;

No. 83-609. BLAIR ET AL. *v.* BOULGER, 464 U. S. 995;

No. 83-5411. BANKS *v.* ALABAMA, 464 U. S. 1010;

No. 83-5477. YELVERTON *v.* BLUE BELL, INC., 464 U. S. 998;

No. 83-5497. KISH *v.* BENEDEK ET AL., 464 U. S. 999;

No. 83-5620. DEAN *v.* UNITED STATES, 464 U. S. 1014; and

No. 83-5666. SRUBAR ET UX. *v.* DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE, 464 U. S. 1012. Petitions for rehearing denied.

JANUARY 25, 1984

Certiorari Denied. (See No. 83-6155, *ante*, p. 200.)

JANUARY 31, 1984

Dismissal Under Rule 53

No. 83-455. MEACHUM, DIRECTOR, OKLAHOMA DEPARTMENT OF CORRECTIONS, ET AL. *v.* BATTLE ET AL. C. A. 10th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 708 F. 2d 1523.

FEBRUARY 21, 1984

Affirmed on Appeal

No. 83-870. CONNECTICUT ET AL. *v.* UNITED STATES ET AL. Affirmed on appeal from C. A. 2d Cir. Reported below: 742 F. 2d 1443.

Appeals Dismissed

No. 82-1888. VOLKSWAGENWERK A. G. *v.* FALZON ET AL., INDIVIDUALLY AND AS NEXT FRIENDS OF FALZON ET AL. Appeal from Sup. Ct. Mich. dismissed for want of jurisdiction. Reported below: 417 Mich. 889.

No. 83-1076. NATIONAL ENQUIRER, INC. *v.* BURNETT. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of jurisdiction. Reported below: 144 Cal. App. 3d 991, 193 Cal. Rptr. 206.

No. 83-1205. HICKS *v.* PENNSYLVANIA. Appeal from Sup. Ct. Pa. dismissed for want of jurisdiction. Reported below: 502 Pa. 344, 466 A. 2d 613.

No. 83-786. SMALL *v.* BOARD OF EXAMINERS OF THE NEVADA STATE BAR. Appeal from Sup. Ct. Nev. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 83-971. RAFTER *v.* HIGGINS ET AL. Appeal from Ct. App. N. Y. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 83-1069. SARGENT *v.* GREAT AMERICAN INSURANCE CO. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 83-5908. ALLEN *v.* IOWA. Appeal from Sup. Ct. Iowa dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 83-6021. ROGERS *v.* FARQUAR. Appeal from Ct. App. Cal., 4th App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 83-818. DAUTREMONT ET AL. *v.* COUNTY OF VENTURA. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of substantial federal question.

No. 83-931. ALLEN ET AL. *v.* BOARD OF ADMINISTRATION OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM. Appeal from Sup. Ct. Cal. dismissed for want of substantial federal question. Reported below: 34 Cal. 3d 114, 665 P. 2d 534.

No. 83-1106. C'EST LA PLACE *v.* GRONER APARTMENTS. Appeal from Ct. App. La., 3d Cir., dismissed for want of substantial federal question. Reported below: 432 So. 2d 1142.

No. 83-1131. TORJESEN *v.* SMITH. Appeal from App. Ct. Ill., 5th Dist., dismissed for want of substantial federal question. Reported below: 114 Ill. App. 3d 147, 448 N. E. 2d 273.

No. 83-5528. Buhse *v.* Krueger. Appeal from Sup. Ct. Wis. dismissed for want of substantial federal question. Reported below: 113 Wis. 2d 429, 335 N. W. 2d 846.

No. 83-5573. Young *v.* Texas. Appeal from Ct. Crim. App. Tex. dismissed for want of substantial federal question.

Vacated and Remanded on Appeal

No. 83-165. York International et al. *v.* Alabama Oxygen Co., Inc., et al. Appeal from Sup. Ct. Ala. Judgment vacated and case remanded for further consideration in light of *Southland Corp.* v. *Keating*, *ante*, p. 1. Justice O'Connor would affirm the judgment. Reported below: 433 So. 2d 1158.

Certiorari Granted—Vacated and Remanded

No. 83-208. Tompkins et al. *v.* Gargiul. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Migra* v. *Warren City School Dist. Bd. of Ed.*, *ante*, p. 75. Reported below: 704 F. 2d 661.

No. 83-209. Local Division 732, Amalgamated Transit Union, et al. *v.* Metropolitan Atlanta Rapid Transit Authority et al. Sup. Ct. Ga. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Southland Corp.* v. *Keating*, *ante*, p. 1. Justice O'Connor would deny certiorari. Reported below: 251 Ga. 15, 303 S. E. 2d 1.

Miscellaneous Orders

No. A-455. Stephens *v.* Kemp, Superintendent, Georgia Diagnostic and Classification Center. Motion of respondent to vacate the stay of execution of sentence of death, granted by order of Court [464 U. S. 1027], denied.

No. A-552. Leighton *v.* Dubowski et al. C. A. 2d Cir. Application for stay, addressed to The Chief Justice and referred to the Court, denied.

No. A-565 (83-5714). Bruton *v.* United States. Application for bail, addressed to Justice Brennan and referred to the Court, denied.

No. A-602. Honig, Superintendent of Public Instruction of California, et al. *v.* Students of California

School for the Blind et al. D. C. E. D. Cal. Application for stay of injunction pending appeal, presented to Justice Powell, and by him referred to the Court, denied.

No. A-634. Fairfield *v.* United States. C. A. 11th Cir. Application for stay, addressed to Justice Rehnquist and referred to the Court, denied.

No. A-646. Gholson *v.* Texas. Ct. App. Tex., 14th Sup. Jud. Dist. Application for stay, presented to Justice Brennan, and by him referred to the Court, denied. Justice Brennan would grant the application.

No. D-366. In re Disbarment of McMurray. Disbarment entered. [For earlier order herein, see 464 U. S. 911.]

No. D-393. In re Disbarment of Moushey. Charles L. Moushey, of Alliance, Ohio, having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on January 16, 1984 [464 U. S. 1066], is hereby discharged.

No. D-398. In re Disbarment of Armentrout. It is ordered that Eugene Lee Armentrout, of West Dundee, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-399. In re Disbarment of Lesesne. It is ordered that Thomas Petigru Lesesne III, of Charleston, S. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-400. In re Disbarment of Pracht. It is ordered that Andrew White Pracht, of Eglin, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-401. In re Disbarment of Ballard. It is ordered that Robert Kyle Ballard, Jr., of Carson, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-405. IN RE DISBARMENT OF GETTINGER. It is ordered that Peter Gettinger, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 35, Orig. UNITED STATES *v.* MAINE ET AL. Report of the Special Master on the Rhode Island boundary is received and ordered filed. Exceptions to the Report, with supporting briefs, may be filed by the parties within 45 days. Replies to such Exceptions, with supporting briefs, may be filed within 30 days. [For earlier decision herein, see, *e. g.*, 452 U. S. 429.]

No. 84, Orig. UNITED STATES *v.* ALASKA. Report of the Special Master on motion of Inupiat Community of the Arctic Slope et al. for leave to intervene is received and ordered filed. [For earlier order herein, see, *e. g.*, 452 U. S. 913.]

No. 95, Orig. ARKANSAS *v.* OKLAHOMA. Motion of Pennsylvania for leave to file a brief as *amicus curiae* out of time is granted. Motion for leave to file bill of complaint denied.

No. 97, Orig. LOUISIANA *v.* WESTERN RESERVE HISTORICAL SOCIETY. Motion for leave to file bill of complaint denied.

No. 82-1295. ESCAMBIA COUNTY, FLORIDA, ET AL. *v.* MCMILLAN ET AL. C. A. 5th Cir. [Probable jurisdiction noted, 460 U. S. 1080.] Motion of appellants Kenneth J. Kelson et al. for leave to file response to supplemental brief of appellees denied.

No. 82-1349. UNITED STATES *v.* S. A. EMPRESA DE VIACAO AEREA RIO GRANDENSE (VARIG AIRLINES) ET AL.; and

No. 82-1350. UNITED STATES *v.* UNITED SCOTTISH INSURANCE CO. ET AL. C. A. 9th Cir. [Certiorari granted, 461 U. S. 925.] Motion of respondent S. A. Empresa de Viacao Aerea Rio Grandense for leave to file supplemental brief after argument granted.

No. 82-1721. SEATTLE TIMES CO., DBA THE SEATTLE TIMES, ET AL. *v.* RHINEHART ET AL. Sup. Ct. Wash. [Certiorari granted, 464 U. S. 812.] Motion of respondent Keith Milton Rhinehart to present oral argument *pro se* and for divided argument denied. Motion of Malcolm L. Edwards, Esquire, to permit Haim Habib, Esquire, to present oral argument *pro hac vice* on behalf of respondents denied.

No. 82-1795. CAPITAL CITIES CABLE, INC., ET AL. *v.* CRISP, DIRECTOR, OKLAHOMA ALCOHOLIC BEVERAGE CONTROL BOARD. C. A. 10th Cir. [Certiorari granted, 464 U. S. 813.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of the Solicitor General to permit Michael W. McConnell, Esquire, to present oral argument *pro hac vice* on behalf of the Federal Communications Commission as *amicus curiae* granted.

No. 83-218. REED ET AL. *v.* ROSS. C. A. 4th Cir. [Certiorari granted, 464 U. S. 1007.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 83-271. NATIONAL COLLEGIATE ATHLETIC ASSN. *v.* BOARD OF REGENTS OF THE UNIVERSITY OF OKLAHOMA ET AL. C. A. 10th Cir. [Certiorari granted, 464 U. S. 913.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 83-226. ARIZONA *v.* RUMSEY. Sup. Ct. Ariz. [Certiorari granted, 464 U. S. 1038.] Motion for appointment of counsel granted, and it is ordered that James R. Rummage, Esquire, of Phoenix, Ariz., be appointed to serve as counsel for respondent in this case.

No. 83-904. OHIO *v.* JOHNSON. Sup. Ct. Ohio. [Certiorari granted, *ante*, p. 1004.] Motion for appointment of counsel granted, and it is ordered that Albert L. Purola, Esquire, of Willoughby, Ohio, be appointed to serve as counsel for respondent in this case.

No. 83-461. CLUB MEDITERRANEE, S. A. *v.* DORIN ET AL. Appeal from App. Div., Sup. Ct. N. Y., 1st Jud. Dept. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 83-558. IRVING INDEPENDENT SCHOOL DISTRICT *v.* TATRO ET UX., INDIVIDUALLY, AND AS NEXT FRIENDS OF TATRO, A MINOR. C. A. 5th Cir. [Certiorari granted, 464 U. S. 1007.] Motion of American Association of School Administrators for leave to participate in oral argument as *amicus curiae*, for divided argument, and for additional time for oral argument denied.

No. 83-751. SECURITIES AND EXCHANGE COMMISSION ET AL. *v.* JERRY T. O'BRIEN, INC., ET AL. C. A. 9th Cir. [Certiorari granted, 464 U. S. 1038.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 83–498. Brown, Director, Department of Law and Public Safety, Division of Gaming Enforcement, State of New Jersey, et al. *v.* Hotel & Restaurant Employees & Bartenders International Union Local 54 et al.; and

No. 83–573. Danziger, Acting Chairman, Casino Control Commission of New Jersey, et al. *v.* Hotel & Restaurant Employees & Bartenders International Union Local 54 et al. C. A. 3d Cir. [Probable jurisdiction noted, 464 U. S. 990.] Motion of National Right to Work Legal Defense Foundation for leave to file a brief as *amicus curiae* granted.

No. 83–838. United States *v.* Lorenzetti. C. A. 3d Cir. [Certiorari granted, 464 U. S. 1068.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 83–892. California State Department of Education et al. *v.* Los Angeles Branch, NAACP, et al. C. A. 9th Cir.; and

No. 83–1015. National Association for the Advancement of Colored People et al. *v.* Hampton County Election Commission et al. Appeal from D. C. S. C. The Solicitor General is invited to file briefs in these cases expressing the views of the United States. Justice Marshall took no part in the consideration or decision of these orders.

No. 83–5725. Sweetman *v.* Township of Pennsauken, New Jersey, 464 U. S. 1036. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* denied.

No. 83–5913. Etlin et al. *v.* Horan, Commonwealth's Attorney. Sup. Ct. Va. Motion of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until March 13, 1984, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

Justice Brennan and Justice Marshall, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for certiorari in this case without reaching the merits of the motion to proceed *in forma pauperis*.

No. 83–5917. In re Meeks. Petition for writ of mandamus denied.

No. 83–760. In re Wilco Marsh Buggies & Draglines, Inc., et al. Petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 83–469. United States *v.* Young. C. A. 10th Cir. Certiorari granted. Reported below: 736 F. 2d 565.

No. 83–832. Paulsen et ux. *v.* Commissioner of Internal Revenue. C. A. 9th Cir. Certiorari granted. Reported below: 716 F. 2d 563.

No. 83–727. Alexander, Governor of Tennessee, et al. *v.* Jennings et al. C. A. 6th Cir. Motion of respondent Rosier Jennings for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 715 F. 2d 1036.

Certiorari Denied. (See also Nos. 83–786, 83–971, 83–1069, 83–5908, and 83–6021, *supra.*)

No. 83–478. Shaffer *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 711 F. 2d 1067.

No. 83–552. Nabors *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 707 F. 2d 1294.

No. 83–568. Offices Known as 50 State Distributing Co., Inc. *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 708 F. 2d 1371.

No. 83–608. Hospital de la Concepcion *v.* Puerto Rico Labor Relations Board. Sup. Ct. P. R. Certiorari denied. Reported below: —— P. R. R. ——.

No. 83–631. Spacefone Corp. *v.* Johnston. C. A. 11th Cir. Certiorari denied. Reported below: 706 F. 2d 1178.

No. 83–632. Mondelli *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 711 F. 2d 567.

No. 83–643. Adams et al. *v.* Bell, Secretary of Education, et al. C. A. D. C. Cir. Certiorari denied. Reported below: 228 U. S. App. D. C. 375, 711 F. 2d 161.

No. 83–673. Wisdom *v.* Pierce, Secretary of Housing and Urban Development, et al. C. A. 8th Cir. Certiorari denied. Reported below: 713 F. 2d 422.

No. 83-679. PAUL ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 720 F. 2d 669.

No. 83-683. BANKSTON *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 435 So. 2d 269.

No. 83-696. MARINO *v.* UNITED STATES; and
No. 83-713. PICCARRETO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 717 F. 2d 27.

No. 83-699. AMERICAN INDUSTRIES, LTD., ET AL. *v.* INTERMODAL CARGO SERVICES, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 711 F. 2d 1063.

No. 83-707. TODD ET AL. *v.* BENAL CONCRETE CONSTRUCTION CO., INC. C. A. 9th Cir. Certiorari denied. Reported below: 710 F. 2d 581.

No. 83-714. CITY OF DUNCANVILLE, TEXAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 706 F. 2d 1356.

No. 83-740. DEL-AWARE UNLIMITED, INC., ET AL. *v.* BALDWIN, DISTRICT ENGINEER, UNITED STATES CORPS OF ENGINEERS, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 720 F. 2d 661.

No. 83-763. ST. FRANCIS HOSPITAL CENTER ET AL. *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 714 F. 2d 872.

No. 83-766. SMITH-CORONA GROUP, CONSUMER PRODUCTS DIVISION, SCM CORP. *v.* UNITED STATES ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 713 F. 2d 1568.

No. 83-769. BELMONT ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 715 F. 2d 459.

No. 83-774. SARIAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 720 F. 2d 669.

No. 83-790. SOUTHERN STATES MOTOR INNS, INC. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 709 F. 2d 647.

No. 83-793. HUGHES *v.* HOFFMAN, SUPERINTENDENT, MISSOURI STATE HIGHWAY PATROL. C. A. 8th Cir. Certiorari denied. Reported below: 714 F. 2d 1407.

No. 83-796. HALLORAN *v.* DISPLAY CORPORATION INTERNATIONAL ET AL. C. A. 6th Cir. Certiorari denied.

No. 83-797. MEMORIAL HOSPITAL ET AL. *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 11th Cir. Certiorari denied. Reported below: 706 F. 2d 1130.

No. 83-809. HINKIE ET AL. *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 715 F. 2d 96.

No. 83-810. YORKE, TRUSTEE IN BANKRUPTCY *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 709 F. 2d 1138.

No. 83-826. HAMED & SALEM, INC. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 716 F. 2d 903.

No. 83-831. STUEBIG, BY HIS GUARDIAN, HECKMANN *v.* WILLIS ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 714 F. 2d 292.

No. 83-841. BILLINGSLEY *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 437 So. 2d 601.

No. 83-844. CHERUBINI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 720 F. 2d 668.

No. 83-849. HYATT HOTELS CORP., DBA HYATT REGENCY NEW ORLEANS *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 11th Cir. Certiorari denied. Reported below: 709 F. 2d 715.

No. 83-875. SCHAAB *v.* SCHAAB ET AL. Sup. Ct. Ky. Certiorari denied.

No. 83-876. FREIRE ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 710 F. 2d 1515.

No. 83-881. SHO-ME POWER CORP. *v.* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 53, AFL-CIO. C. A. 8th Cir. Certiorari denied. Reported below: 715 F. 2d 1322.

No. 83-889. BUNNAN TONG & CO., LTD. *v.* F. W. WOOLWORTH CO. ET AL.; and

No. 83-955. UNITED GARMENT MANUFACTURING CO., LTD. *v.* NELSON, A MINOR, BY CARSON, GUARDIAN AD LITEM, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 717 F. 2d 1120.

No. 83-905. STAINES *v.* TEXAS. Ct. App. Tex., 14th Sup. Jud. Dist. Certiorari denied. Reported below: 659 S. W. 2d 50.

No. 83-907. RIZZUTO *v.* RIZZUTO. Super. Ct. N. J., App. Div. Certiorari denied.

No. 83-914. MERICAN, INC., ET AL. *v.* CATERPILLAR TRACTOR CO. C. A. 3d Cir. Certiorari denied. Reported below: 713 F. 2d 958.

No. 83-919. PITCHFORD *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 115 Ill. App. 3d 164, 450 N. E. 2d 349.

No. 83-921. COMMONWEALTH NATIONAL BANK *v.* ASHE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 712 F. 2d 864.

No. 83-922. ROSENWALD *v.* BARBIERI, COURT ADMINISTRATOR OF PENNSYLVANIA, ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 501 Pa. 563, 462 A. 2d 644.

No. 83-924. GALANTI *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 709 F. 2d 706.

No. 83-926. KLEIBOEMER ET AL. *v.* DISTRICT OF COLUMBIA. Ct. App. D. C. Certiorari denied. Reported below: 458 A. 2d 731 and 466 A. 2d 846.

No. 83-936. HAWES ET AL. *v.* ABARCA ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 720 F. 2d 657.

No. 83-938. WATSON *v.* M. W. KELLOGG CO. C. A. 4th Cir. Certiorari denied. Reported below: 716 F. 2d 899.

No. 83-944. PIERI *v.* SOUTH CENTRAL BELL TELEPHONE CO. C. A. 5th Cir. Certiorari denied. Reported below: 712 F. 2d 1414.

No. 83–945. UNION OIL COMPANY OF CALIFORNIA *v.* DILLINGHAM TUG & BARGE CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 707 F. 2d 1086.

No. 83–947. VANCE *v.* UTAH. Sup. Ct. Utah. Certiorari denied. Reported below: 671 P. 2d 124.

No. 83–950. MOSS *v.* NEWMAN. C. A. 2d Cir. Certiorari denied. Reported below: 719 F. 2d 5.

No. 83–951. PERCY ET AL. *v.* BUCKHANON ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 708 F. 2d 1209.

No. 83–952. UNITED STATES *v.* WILSON ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 707 F. 2d 304.

No. 83–953. ROCK *v.* ANTONIO. Sup. Ct. N. M. Certiorari denied.

No. 83–959. HOUGLAND ET AL. *v.* GROSS, AS RECEIVER FOR HOUGLAND BARGE LINE, INC. C. A. 6th Cir. Certiorari denied. Reported below: 712 F. 2d 1034.

No. 83–965. CLOWARD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 715 F. 2d 1339.

No. 83–968. STORNIOLO *v.* GINA KAREN FISHING, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 718 F. 2d 1111.

No. 83–969. LUBIN *v.* CRITTENDEN HOSPITAL ASSN. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 713 F. 2d 414.

No. 83–980. REDDING ET AL. *v.* FAIRMAN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 717 F. 2d 1105.

No. 83–983. TAKO ET UX. *v.* MAYER & CIE ET AL. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 437 So. 2d 686.

No. 83–992. DETROIT HEALTH CORP. ET AL. *v.* BENCE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 712 F. 2d 1024.

No. 83–993. IMPRO PRODUCTS, INC. *v.* HERRICK ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 715 F. 2d 1267.

No. 83–996. BIER *v.* FLEMING ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 717 F. 2d 308.

No. 83–1002. SOLEM, WARDEN *v.* NERISON. C. A. 8th Cir. Certiorari denied. Reported below: 715 F. 2d 415.

No. 83–1003. PERCY, SECRETARY, WISCONSIN DEPARTMENT OF HEALTH AND SOCIAL SERVICES *v.* DAUBERT ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 713 F. 2d 328.

No. 83–1004. TOSHIBA AMERICA, INC. *v.* COPY-DATA SYSTEMS, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 722 F. 2d 735.

No. 83–1008. PENNSYLVANIA DENTAL ASSN. *v.* CUTLER. C. A. 3d Cir. Certiorari denied. Reported below: 722 F. 2d 733.

No. 83–1009. NORTH CANTON ENTERPRISES OF PENNSYLVANIA, INC. *v.* BOARD OF PROPERTY ASSESSMENT, APPEALS AND REVIEW OF ALLEGHENY COUNTY, ET AL. Pa. Commw. Ct. Certiorari denied. Reported below: 74 Pa. Commw. 479, 459 A. 2d 1366.

No. 83–1016. KIMBERLY-CLARK CORP. *v.* KALMAN. C. A. Fed. Cir. Certiorari denied. Reported below: 713 F. 2d 760.

No. 83–1017. BOHRER *v.* HANES CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 715 F. 2d 213.

No. 83–1018. ESPOSITO ET AL. *v.* MISTER SOFTEE, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1445.

No. 83–1019. WIED *v.* VALHI, INC. Sup. Ct. Del. Certiorari denied. Reported below: 466 A. 2d 9.

No. 83–1025. STONE & WEBSTER ENGINEERING CORP. ET AL. *v.* HEFFELFINGER, ADMINISTRATRIX OF THE ESTATE OF HEFFELFINGER, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 723 F. 2d 897.

No. 83–1026. LINDE, THOMSON, FAIRCHILD, LANGWORTHY, KOHN & VAN DYKE ET AL. *v.* T. J. RANEY & SONS, INC. C. A. 10th Cir. Certiorari denied. Reported below: 717 F. 2d 1330.

No. 83-1028. McNeil *v.* Rafton et al. C. A. 9th Cir. Certiorari denied. Reported below: 718 F. 2d 1111.

No. 83-1033. Satellite Television & Associated Resources, Inc. *v.* Continental Cablevision of Virginia, Inc., et al. C. A. 4th Cir. Certiorari denied. Reported below: 714 F. 2d 351.

No. 83-1034. Brain et al. *v.* Roadway Express, Inc., et al. C. A. 6th Cir. Certiorari denied. Reported below: 720 F. 2d 678.

No. 83-1036. Weisz *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 231 U. S. App. D. C. 1, 718 F. 2d 413.

No. 83-1042. Woo *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1444.

No. 83-1043. Burns *v.* Georgia. Ct. App. Ga. Certiorari denied. Reported below: 166 Ga. App. 766, 305 S. E. 2d 398.

No. 83-1044. Winicki *v.* Mallard et al. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 441 So. 2d 693.

No. 83-1048. Armando De La Cerra *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 718 F. 2d 1112.

No. 83-1049. Harari et al. *v.* Bache Halsey Stuart Shields, Inc. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 92 App. Div. 2d 1089, 461 N. Y. S. 2d 662.

No. 83-1050. Emrich et al. *v.* Touche Ross & Co. et al. C. A. 9th Cir. Certiorari denied. Reported below: 714 F. 2d 152.

No. 83-1051. Babcock Memorial Presbyterian Church *v.* Presbytery of Baltimore of the United Presbyterian Church in the United States of America et al. Ct. App. Md. Certiorari denied. Reported below: 296 Md. 573, 464 A. 2d 1008.

No. 83-1052. Phillips *v.* Smith, Superintendent, Attica Correctional Facility. C. A. 2d Cir. Certiorari denied. Reported below: 717 F. 2d 44.

No. 83-1058. HALL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 718 F. 2d 1108.

No. 83-1059. LANGEN *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 60 N. Y. 2d 170, 456 N. E. 2d 1167.

No. 83-1060. LAWTHER *v.* JACOBS MANUFACTURING CO. C. A. 5th Cir. Certiorari denied.

No. 83-1062. BAGLEY ET AL. *v.* COLLINS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 716 F. 2d 895.

No. 83-1063. BRUMLEY ESTATE ET AL. *v.* IOWA BEEF PROCESSORS, INC. C. A. 5th Cir. Certiorari denied. Reported below: 704 F. 2d 1351 and 715 F. 2d 996.

No. 83-1064. BLACKWELL *v.* MUNICIPAL COURT OF CALIFORNIA, LOS ANGELES COUNTY, MALIBU JUDICIAL DISTRICT, ET AL. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 83-1071. MCGINTY ET AL. *v.* SMITH, DISTRICT ATTORNEY OF SAN FRANCISCO, CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 83-1078. JEFFBOAT, INC. *v.* ROBERTSON, ADMINISTRATOR OF THE ESTATE OF ROBERTSON. C. A. 6th Cir. Certiorari denied. Reported below: 722 F. 2d 742.

No. 83-1079. TRAVERS *v.* TRAVENOL LABORATORIES, INC. C. A. 7th Cir. Certiorari denied. Reported below: 723 F. 2d 66.

No. 83-1083. SWEPENISER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 714 F. 2d 157.

No. 83-1088. NICHOLS *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 657 S. W. 2d 932.

No. 83-1095. TAYLOR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 716 F. 2d 913.

No. 83-1099. ARRINGTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 719 F. 2d 701.

No. 83-1101. NILES *v.* UNIVERSITY INTERSCHOLASTIC LEAGUE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 715 F. 2d 1027.

No. 83-1103. AMERICAN COMMERCIAL BARGE LINES ET AL. *v.* BERRY. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 114 Ill. App. 3d 354, 450 N. E. 2d 436.

No. 83-1108. ST. CLAIR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 720 F. 2d 1037.

No. 83-1110. RUPLE *v.* CITY OF VERMILLION, SOUTH DAKOTA, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 714 F. 2d 860.

No. 83-1112. MURILLO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 714 F. 2d 155.

No. 83-1113. WILSON *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 83-1114. KING *v.* FIDELITY NATIONAL BANK OF BATON ROUGE. C. A. 5th Cir. Certiorari denied. Reported below: 712 F. 2d 188.

No. 83-1120. SCARSELLETTI *v.* AETNA CASUALTY & SURETY CO. Super. Ct. Pa. Certiorari denied.

No. 83-1133. BEHAR *v.* SOUTHEAST BANK TRUST CO., N. A., PERSONAL REPRESENTATIVE OF THE ESTATE OF BEHAR. C. A. 11th Cir. Certiorari denied.

No. 83-1137. CORDELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 723 F. 2d 1283.

No. 83-1147. RADSECK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 718 F. 2d 233.

No. 83-1165. CAPITOL CITY LUMBER CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 721 F. 2d 546.

No. 83-1177. COHEN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1441.

No. 83-5193. FOUNDAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 709 F. 2d 1518.

No. 83-5293. ROBINSON *v.* CHAPMAN ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 704 F. 2d 1252.

No. 83-5335. RABB *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 720 F. 2d 669.

No. 83-5349. MILLER *v.* PIERCE, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 707 F. 2d 518.

No. 83-5385. MATHIS *v.* UNITED STATES; and FOSTER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 720 F. 2d 669 (first case); 720 F. 2d 668 (second case).

No. 83-5483. BEALE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 465 A. 2d 796.

No. 83-5512. WILSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 83-5560. WARE *v.* UNITED STATES;
No. 83-5613. MCGUIRE *v.* UNITED STATES; and
No. 83-5650. ARABIA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 715 F. 2d 810.

No. 83-5563. DENNIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 720 F. 2d 668.

No. 83-5586. HOLT *v.* CONTINENTAL GROUP, INC. C. A. 2d Cir. Certiorari denied. Reported below: 708 F. 2d 87.

No. 83-5606. FORD *v.* DAVIS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 716 F. 2d 902.

No. 83-5609. CROWE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 718 F. 2d 1104.

No. 83-5611. WINDSOR *v.* THE TENNESSEAN ET AL. Ct. App. Tenn. Certiorari denied. Reported below: 654 S. W. 2d 680.

No. 83-5615. MCALPIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 710 F. 2d 838.

No. 83-5629. JOHNSON *v.* UNITED STATES; and
No. 83-5657. JOHNSON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 713 F. 2d 654.

No. 83-5630. BRUZZESE *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 94 N. J. 210, 463 A. 2d 320.

No. 83-5655. LOFTIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 712 F. 2d 1414.

No. 83–5679. HORNICK *v.* NOYES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 708 F. 2d 321.

No. 83–5680. GRANGER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 718 F. 2d 1112.

No. 83–5699. GREGORIO *v.* UNITED STATES PAROLE COMMISSION. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1439.

No. 83–5706. CURRA-BARONA ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 706 F. 2d 1089.

No. 83–5713. CHRISTENSEN *v.* SPALDING. C. A. 9th Cir. Certiorari denied. Reported below: 716 F. 2d 910.

No. 83–5723. GARAUX *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 83–5728. RAHEEM *v.* HENDERSON, SUPERINTENDENT, AUBURN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1440.

No. 83–5764. FLEMING *v.* STALLER ET AL. C. A. 3d Cir. Certiorari denied.

No. 83–5829. WALKER *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 113 Ill. App. 3d 1074, 448 N. E. 2d 208.

No. 83–5837. PEREZ-ROBLES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 718 F. 2d 700.

No. 83–5841. CLARK *v.* COOMBE, SUPERINTENDENT, EASTERN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 83–5851. KETTLER *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 112 Ill. App. 3d 1061, 446 N. E. 2d 550.

No. 83–5871. DUNN *v.* MAGGIO, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 712 F. 2d 998.

No. 83–5872. GATES *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 8th Cir. Certiorari denied. Reported below: 712 F. 2d 1282.

No. 83-5877. WEICHELL *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 390 Mass. 62, 453 N. E. 2d 1038.

No. 83-5879. WILLIAMS-EL *v.* YOUNG, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 720 F. 2d 674.

No. 83-5881. BAGGETT *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 115 Ill. App. 3d 924, 450 N. E. 2d 913.

No. 83-5883. KEENAN *v.* ELO ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 723 F. 2d 909.

No. 83-5884. HINES *v.* WORKERS' COMPENSATION APPEALS BOARD ET AL. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 83-5885. CARROLL *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 440 So. 2d 343.

No. 83-5890. WELLS *v.* MCKASKLE, ACTING DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 716 F. 2d 900.

No. 83-5893. RUSHING *v.* STOCKER ET AL. C. A. 10th Cir. Certiorari denied.

No. 83-5895. WEBB *v.* PERINI, SUPERINTENDENT, MARION CORRECTIONAL INSTITUTION. C. A. 6th Cir. Certiorari denied. Reported below: 720 F. 2d 680.

No. 83-5898. WOODRUFF *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 113 Ill. App. 3d 1172, 457 N. E. 2d 174.

No. 83-5900. HINTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 719 F. 2d 711.

No. 83-5906. HOLLIN *v.* SOWDERS, SUPERINTENDENT, KENTUCKY STATE REFORMATORY. C. A. 6th Cir. Certiorari denied. Reported below: 710 F. 2d 264.

No. 83-5910. CAYLOR *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 437 So. 2d 444.

No. 83-5916. PRICE ET AL. *v.* COHEN, SECRETARY OF PUBLIC WELFARE OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 715 F. 2d 87.

No. 83-5918. POPPOS *v.* YOUNG ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 711 F. 2d 1051.

No. 83-5921. DOWNING *v.* OHIO. Ct. App. Ohio, Tuscarawas County. Certiorari denied.

No. 83-5927. POWELL *v.* MITCHELL ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 716 F. 2d 897.

No. 83-5929. REED *v.* MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 720 F. 2d 679.

No. 83-5931. JONES *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 83-5935. BRYANT *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 717 F. 2d 1400.

No. 83-5936. DOE ET AL. *v.* STAPLES, DIRECTOR OF THE HAMILTON COUNTY WELFARE DEPARTMENT, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 706 F. 2d 985.

No. 83-5944. OLIVER *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 720 F. 2d 766.

No. 83-5946. REDDING *v.* FAIRMAN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 723 F. 2d 67.

No. 83-5947. MILLER *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 115 Ill. App. 3d 592, 450 N. E. 2d 767.

No. 83-5949. SANDERS *v.* ISRAEL, SUPERINTENDENT, WAUPUN CORRECTIONAL INSTITUTION. C. A. 7th Cir. Certiorari denied. Reported below: 717 F. 2d 422.

No. 83-5952. LOPEZ *v.* SCULLY, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1439.

No. 83-5959. FAHEY *v.* CODO ET AL. Sup. Ct. Ill. Certiorari denied.

No. 83-5960. FOREMAN *v.* RICKETTS, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS. Sup. Ct. Ariz. Certiorari denied.

No. 83-5964. SCHLICHER *v.* ROCHE ET AL. C. A. 10th Cir. Certiorari denied.

No. 83-5968. GREENE *v.* GREENE. Sup. Ct. Conn. Certiorari denied.

No. 83-5969. JACKSON *v.* MAGGIO, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 717 F. 2d 1397.

No. 83-5970. HENDRIX *v.* DUCKWORTH, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 720 F. 2d 682.

No. 83-5975. SENTI *v.* SHARMA ET AL. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied.

No. 83-5976. PERKINS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 60 N. Y. 2d 859, 458 N. E. 2d 387.

No. 83-5978. SMITH *v.* CAMERON. C. A. 6th Cir. Certiorari denied. Reported below: 714 F. 2d 142.

No. 83-5979. SIMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 719 F. 2d 375.

No. 83-5983. RICE *v.* MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1100.

No. 83-5984. WILSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 720 F. 2d 608.

No. 83-5986. HORNSBY ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 710 F. 2d 731.

No. 83-5988. CIUZIO *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 231 U. S. App. D. C. 1, 718 F. 2d 413.

No. 83-5989. KENNEDY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 714 F. 2d 968.

No. 83-5990. BORI *v.* TRUSTEES OF COLUMBIA UNIVERSITY. Ct. App. N. Y. Certiorari denied. Reported below: 60 N. Y. 2d 554, 454 N. E. 2d 1318.

No. 83-5991. CROXTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 720 F. 2d 682.

No. 83–5993. WILLIAMS *v.* MAGGIO, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 714 F. 2d 554.

No. 83–5994. WILLIAMS *v.* WILLIAMS, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 706 F. 2d 316.

No. 83–5996. TOMAY-YBLY *v.* ZURICH-AMERICAN INSURANCE COS. C. A. 9th Cir. Certiorari denied. Reported below: 720 F. 2d 684.

No. 83–5997. OLSEN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 83–5998. MALLY *v.* NEW YORK UNIVERSITY ET AL. C. A. 2d Cir. Certiorari denied.

No. 83–6000. PATTERSON *v.* MCKASKLE, ACTING DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 712 F. 2d 1414.

No. 83–6002. GIBBS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 714 F. 2d 134.

No. 83–6003. EVANS *v.* GRANNIS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 718 F. 2d 1090.

No. 83–6004. DAVIS ET AL. *v.* CENTRAL INTELLIGENCE AGENCY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 711 F. 2d 858.

No. 83–6006. JOHNSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1443.

No. 83–6007. HALPIN *v.* FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 443 So. 2d 986.

No. 83–6008. CARSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 718 F. 2d 1093.

No. 83–6012. GONZALES *v.* TEXAS. Ct. App. Tex., 2d Sup. Jud. Dist. Certiorari denied.

No. 83–6013. LUCERO *v.* OGDEN ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 718 F. 2d 355.

No. 83–6018. WHITE *v.* TOPPITZER. Sup. Ct. Pa. Certiorari denied.

No. 83–6019. MIRRIONE *v.* ANDERSON ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 717 F. 2d 743.

No. 83–6022. MITCHELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 722 F. 2d 743.

No. 83–6023. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 722 F. 2d 748.

No. 83–6025. UNDERWOOD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 717 F. 2d 482.

No. 83–6031. HOLLIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 718 F. 2d 277.

No. 83–6033. TUGMAN ET AL. *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 4th Cir. Certiorari denied. Reported below: 720 F. 2d 673.

No. 83–6038. RICHARDSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 723 F. 2d 899.

No. 83–6039. JOHNSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 720 F. 2d 519.

No. 83–6046. JANOE *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 720 F. 2d 1156.

No. 83–6047. PAYNE ET AL. *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 98 Ill. 2d 45, 456 N. E. 2d 44.

No. 83–6052. PRICE ET AL. *v.* WASHINGTON STATE GAME DEPARTMENT. Ct. App. Wash. Certiorari denied. Reported below: 35 Wash. App. 1020.

No. 83–6060. COX *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 83–6062. BRIDGES *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 230 U. S. App. D. C. 387, 717 F. 2d 1444.

No. 83–6064. JONES *v.* METZ ET AL. C. A. 3d Cir. Certiorari denied.

No. 83–6065. KILLINGSWORTH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 719 F. 2d 1130.

No. 83-6067. GARRETT *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 232 U. S. App. D. C. 58, 720 F. 2d 705.

No. 83-6068. EVERETT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 719 F. 2d 1119.

No. 83-6069. KELE *v.* CARLSON, DIRECTOR, FEDERAL BUREAU OF PRISONS, ET AL. C. A. 10th Cir. Certiorari denied.

No. 83-6071. MOYA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 721 F. 2d 606.

No. 83-6072. MANNING *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 718 F. 2d 1112.

No. 83-6074. SEDLAK *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 720 F. 2d 715.

No. 83-6078. STEWART *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 722 F. 2d 739.

No. 83-6081. BAKER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 722 F. 2d 343.

No. 83-6082. GONZALEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 719 F. 2d 1516.

No. 83-6088. CHRISTENSEN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied.

No. 83-6089. GIPSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 83-6094. MATASA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1442.

No. 83-6095. ELY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 719 F. 2d 902.

No. 83-6103. MACKENZIE *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 317 Pa. Super. 631, 464 A. 2d 530.

No. 83-6104. THOMPSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 714 F. 2d 155.

No. 83-6105. CARNEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 719 F. 2d 403.

No. 83-6108. YATES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 722 F. 2d 743.

No. 83-6110. ROGERS ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 719 F. 2d 405.

No. 83-6112. DUDLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 713 F. 2d 463.

No. 83-6126. SAMUELSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 697 F. 2d 255.

No. 83-6133. BRYAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 721 F. 2d 572.

No. 83-6146. WASHINGTON *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 83-6153. FORSBERG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 725 F. 2d 691.

No. 81-2363. PENNHURST STATE SCHOOL AND HOSPITAL ET AL. *v.* HALDERMAN ET AL. C. A. 3d Cir. Motion of respondents Terri L. Halderman et al. for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 673 F. 2d 628.

No. 82-1876. FOREMOST PRO COLOR, INC. *v.* EASTMAN KODAK CO. C. A. 9th Cir. Certiorari denied. JUSTICE BLACKMUN would grant certiorari on the Robinson-Patman Act issues. Reported below: 703 F. 2d 534.

No. 83-466. RUSSO *v.* MITCHELL ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE REHNQUIST took no part in the consideration or decision of this petition. Reported below: 228 U. S. App. D. C. 225, 709 F. 2d 51.

No. 83-511. CONTINENTAL GROUP, INC. *v.* HOLT. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 708 F. 2d 87.

No. 83-723. UNION PROCESSING CORP. *v.* ATKIN ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 59 N. Y. 2d 919, 453 N. E. 2d 522.

JUSTICE WHITE, with whom THE CHIEF JUSTICE and JUSTICE POWELL join, dissenting.

Petitioner, Union Processing Corp. (Union), operates a scrap-metal business in Auburn, N. Y. Respondents, Morris, Sol, and Samuel Atkin (Atkins), are in the same business in Rochester. Both Union and Atkins purchase and process scrap metal and then sell the processed metal to steel mills and foundries. In 1974, Union and Atkins independently decided to establish metal-shredding operations in Rochester. Steel mills prefer shredded metal because shredding allows the separation of ferrous and non-ferrous scrap, yielding a cleaner grade of scrap. When Union learned that Atkins had entered into a purchase contract for a shredder, it initiated negotiations to ensure that there would be only one shredding operation in Rochester. The parties agreed that there were not enough raw materials in the area to support two shredding operations. Ultimately, they agreed that Atkins would assign the purchase contract to Union in return for 2% of Union's gross sales for the next seven years. Within two years, Union ceased making payments under the contract.

Atkins brought suit in October 1978 for payments due under the contract. Union argued that the contract was unenforceable because part of the consideration for the contract consisted of an oral promise by Atkins not to operate a shredder in the Rochester area. Such an agreement, Union contended, violates § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1.

The trial court found that the oral agreement not to compete was indeed a part of the contract. It concluded that since the agreement constituted a horizontal division of territories, it was a *per se* violation of the Sherman Act.

On appeal, the Appellate Division of the New York Supreme Court rejected Union's contention that since the contract constituted a horizontal division of markets it was *per se* illegal under § 1 of the Sherman Act. 90 App. Div. 2d 332, 457 N. Y. S. 2d 152 (1982). The court reasoned that the rule of *per se* illegality is applicable only if the entire geographic market is divided. It found that the relevant geographic market in this case consisted of the entire area in which steel mills purchase the end product produced by the shredder. Because only the Rochester area was allocated, the court concluded that a rule-of-reason analysis was appropriate. Using that analysis, the court found the impact of the agreement on competition to be minimal because Atkins could operate a shredder anywhere in the relevant geographic market outside of Rochester.

In a one-paragraph memorandum, the New York Court of Appeals affirmed. 59 N. Y. 2d 919, 453 N. E. 2d 522 (1983). Apparently it realized that the market that was divided was the market in which raw materials were purchased, rather than the market in which shredded scrap was sold, for it stated: "Additionally we observe that there is no evidentiary support in the record for any finding that the scrap metals/raw materials market (as distinguished from the shredded scrap/products market) was limited to the Rochester area to which the agreement of the parties related." *Id.*, at 921, 453 N. E. 2d, at 523.

Union then petitioned for a writ of certiorari from this Court, arguing that the state courts misconceived the meaning of our opinions dealing with horizontal division of markets. Such market divisions, Union correctly argues, have consistently been deemed *per se* illegal.

Our cases make clear the error of the New York courts. As we said in *United States* v. *Topco Associates, Inc.*, 405 U. S. 596, 608 (1972): "One of the classic examples of a *per se* violation of § 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition." We have time and again "rejected the notion that naked restraints of trade are to be tolerated because they are well intended or because they are allegedly developed to increase competition." *Id.*, at 610.

Under the view of the courts below, the *per se* rule is not to be applied to cases involving horizontal division of markets so long as the parties leave some residual zone in which they still compete; that is, the rule does not govern cases in which the entire market is not allocated. Apparently, if two companies in some national market agreed that one would not compete in New York and the other would not compete in California, the *per se* rule would not apply if they continued to compete in the other 48 States. Not surprisingly, the courts cited no decision of this Court in support of that position.

I assume that the Court has denied this petition because it has "bigger fish to fry," rather than because it views the decision below as correct. However, because a substantial federal question has been decided in a manner that apparently conflicts with the applicable decisions of this Court, I would grant the petition for a writ of certiorari. Indeed, the decision is a candidate for summary reversal.

No. 83–767. EL PASO TIMES, INC., ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS. C. A. 5th Cir. Certiorari denied. JUSTICE BRENNAN would grant certiorari. Reported below: 713 F. 2d 1114.

No. 83–789. ADAMS ET AL. *v.* PROCTOR & GAMBLE MANUFACTURING CO. C. A. 4th Cir. Certiorari denied. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 697 F. 2d 582.

No. 83–791. TEXAS *v.* MEAD. Ct. Crim. App. Tex. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 645 S. W. 2d 279.

JUSTICE STEVENS, respecting the denial of certiorari.

The question that JUSTICE REHNQUIST now believes merits review—the proper standard of review concerning a *Witherspoon* ruling—was extensively analyzed by the Court of Appeals and presented in the petition for certiorari in *O'Bryan* v. *Estelle*, 714 F. 2d 365 (CA5 1983), cert. denied *sub nom. O'Bryan* v. *McKaskle*, *ante*, p. 1013.[1] That question is not, however, presented by the State of Texas in its certiorari petition in this case.[2]

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[1] Indeed, JUSTICE REHNQUIST discusses *O'Bryan*, *post*, at 1046, and n. 8. JUSTICE BRENNAN and JUSTICE MARSHALL dissented from the denial of certiorari in *O'Bryan* on the basis of their continuing belief that the death penalty constitutes cruel and unusual punishment. No other Justice recorded a dissent from that denial. Moreover, had THE CHIEF JUSTICE, JUSTICE REHNQUIST, and JUSTICE O'CONNOR, who today find the question warranting an exercise of certiorari jurisdiction, voted to grant in that case, under our Rule of Four the question would now be before us, and hence there would presumably be no need for today's dissenting opinion.

[2] Of course, if the petition in this case had been granted, the parties would naturally have briefed the question that is presented and argued in Texas' petition. Texas presumably would have had to have waited until oral argument to discover that the question JUSTICE REHNQUIST finds in this case is the one it presented.

The only question raised in the certiorari petition reads as follows:

"WHETHER THE TEXAS COURT OF CRIMINAL APPEALS CORRECTLY APPLIED *WITHERSPOON* V. *ILLINOIS*, 391 U. S. 510 (1968) AND *ADAMS* V. *TEXAS*, 4[4]8 U. S. 38 (1980), WHEN IT REVERSED A TRIAL COURT'S EXCLUSION FOR CAUSE OF ONE VENIREMAN WHO UNAMBIGUOUSLY STATED THAT HE WOULD AUTOMATI-

Since the question JUSTICE REHNQUIST has discussed at such length "was neither presented to the [Texas] cour[t] nor presented to this Court in the petition for certiorari," *Eddings* v. *Oklahoma*, 455 U. S. 104, 120 (1982) (BURGER, C. J., joined by WHITE, BLACKMUN, and REHNQUIST, JJ., dissenting),[3] and since JUS-

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CALLY VOTE TO PRECLUDE IMPOSITION OF THE DEATH PENALTY." Pet. for Cert. i.

More specifically, Texas contends that the defense failed to rehabilitate the venireman excused for cause after the venireman had initially expressed an unequivocal opposition to the death penalty, arguing that the "voir dire examination, as a whole, demonstrates a juror who would automatically vote against the imposition of the death penalty . . . ." *Id.*, at 9. Given the nature of the question presented, the petition primarily consists of a transcript of the *voir dire* examination of the excused venireman. In other words, Texas asks that *this Court* conduct a *de novo* review on the *Witherspoon* issue.

The dissent's reasoning in attempting to suggest that the "deference" question was even decided below, much less presented in the petition, is quite difficult to follow. JUSTICE REHNQUIST finds "no support in our case law for the utter absence of deference paid to the trial court's judgment in this case," *post*, at 1048, but somehow concludes that the Texas Court of Criminal Appeals apparently felt that it was required to disregard totally the trial court's judgment on the basis of our case law, *post*, at 1044, n. 2, notwithstanding the fact that in *Hughes* v. *State*, 563 S. W. 2d 581, cert. denied, 440 U. S. 950 (1979), the Texas Court of Criminal Appeals explicitly stated *with respect to a Witherspoon issue before it:*

> "We must be mindful that where we only have a cold record before us the trial judge in passing on the answers of the 'equivocating veniremen' has the opportunity to observe the tone of voice and demeanor of the prospective juror in determining the precise meaning intended." 563 S. W. 2d, at 585 (dictum).

The dissent below in this case quoted this language, and argued that the majority had erred in not following *Hughes* in this case. App. to Pet. for Cert. A-22. In light of the fact that the only statement ever made by the Texas Court of Criminal Appeals on the "deference" question is favorable to the prosecution, it is no wonder that Texas did not present this question in its petition.

[3] The dissenting opinion below, it should be noted, was filed regarding the court's denial without opinion of the State's second motion for rehearing. One perhaps could speculate on the basis of the papers we have before us that the State attempted to raise the "deference" issue in its second motion for rehearing, since the issue was discussed at the close of the dissenting opinion. *Id.*, at A-21 to A-22. It would appear, however, from the dissenting opinion that the propriety of the arguments presented in the State's second motion was in some doubt, and the dissent was quite prepared to reconsider the case *sua sponte*. *Id.*, at A-1 to A-2. There was no response to the dissent,

TICE REHNQUIST, by not discussing the question that is presented, apparently agrees that it does not merit review, see, *e. g.*, *United States* v. *Johnston*, 268 U. S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts"); see also *Torres-Valencia* v. *United States*, 464 U. S. 44 (1983) (REHNQUIST, J., dissenting), I simply note that the Court's decision to deny the petition for a writ of certiorari in this case is demonstrably consistent with the principles which inform our exercise of certiorari jurisdiction.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE, and JUSTICE O'CONNOR join, dissenting.

Respondent Mead was convicted by a jury of the capital offense of murdering a police officer acting in the line of duty. He was sentenced to death. On appeal, Mead argued that some veniremen were improperly excluded from the jury because of their opposition to the death penalty. See *Witherspoon* v. *Illinois*, 391 U. S. 510 (1968). The Texas Court of Criminal Appeals, with four judges dissenting, conducted a *de novo* review of the *voir dire* examination of one of the excluded veniremen and agreed with respondent. 645 S. W. 2d 279 (1983) (en banc).[1] The court gave no deference to the judgment of the trial court that the juror was unalterably opposed to the death penalty and would purposely bias his answers accordingly. Because of the substantial disarray among state and federal appellate courts as to the degree of deference, if any, due to a trial court's determination that a juror may

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the language in *Hughes* was not disapproved by the majority, and hence there are two reasonable conclusions: (1) the majority below, even after giving deference to the trial court's ability to observe the demeanor of the venireman, nevertheless concluded that his excusal for cause was erroneous; or (2) the State had waived whatever arguments it raised in its second motion for rehearing as a matter of state practice by failing to raise them earlier. Of course, since Texas is not raising the "deference" question in its petition, it is understandable that it has not attempted to show that the question was properly raised below.

[1] The court reversed Mead's conviction and remanded the case for a new trial. Ordinarily, the appropriate remedy for a *Witherspoon* violation is to reverse only the death sentence, not the underlying conviction. 391 U. S., at 516–518. See also *Adams* v. *Texas*, 448 U. S. 38, 51 (1980). Apparently, however, the Texas Court of Criminal Appeals has no authority to direct a new trial before a different jury solely on the issue of punishment. See *Ellison* v. *State*, 432 S. W. 2d 955, 957 (Tex. Crim. App. 1968).

be excluded for cause under *Witherspoon*, I would grant certiorari to the Texas Court of Criminal Appeals and review the case.[2]

In *Witherspoon*, 391 U. S., at 522, we held that a venireman cannot be excluded for cause in a capital case simply because he voices "general objections" to the death penalty or expresses "conscientious or religious scruples against its infliction." Provided the venireman is willing to fulfill his oath as a juror and consider the full range of penalties provided by state law, he may not be disqualified on account of his beliefs. We stressed, however, that the State is not disabled from challenging jurors for cause when they make it clear that they would "vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings." *Id.*, at 522, n. 21. In subsequent cases we have reaffirmed that the State has a legitimate interest in obtaining jurors who will consider and decide the facts impartially and faithfully apply the law as charged by the court. *Adams* v. *Texas*, 448 U. S. 38, 46 (1980); *Lockett* v. *Ohio*, 438 U. S. 586, 596–597 (1978); *Boulden* v. *Holman*, 394 U. S. 478, 482 (1969).

As a result of *Witherspoon* and these later cases, trial courts are faced with the difficult task of distinguishing between a venireman so unalterably opposed to the death penalty as to be unable to apply the law impartially and one who, despite his objections, will conscientiously seek to apply the law in accordance with the facts developed at trial. We have mandated this inquiry; but we have failed to articulate any standard of review for alleged *Witherspoon* violations. We have failed to explain whether a trial court's determination that a given venireman may be excluded for cause under *Witherspoon* should be reversed only if, like other factual determinations, it is clearly erroneous or whether an appellate court must examine the transcript of the *voir dire* and draw its own conclusions, with no deference accorded the trial court's judgment.[3] The result, predictably, has been near chaos throughout the state and federal appellate courts.

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[2] The Texas courts are of course free, as a matter of state law, to decide for themselves what deference shall be given by appellate courts to the findings of trial courts. But since in this case the four dissenting judges stated that under the majority's result "the discretion of trial judges across this state in excusing potential venirepersons under *Witherspoon* has been seriously eroded," App. to Pet. for Cert. A–21, while the majority insisted that "[t]his Court . . . is bound by the decisions of the Supreme Court of the United States," *id.*, at B–2, the Texas Court of Criminal Appeals apparently felt that it was required to conduct *de novo* review of the trial court's rulings as a matter of federal constitutional law. The issue also arises in federal courts entertaining petitions for writs of habeas corpus under 28 U. S. C. § 2254, see nn. 7 and 8, *infra*, where the standard of review is governed by 28 U. S. C. § 2254(d). See *Sumner* v. *Mata*, 449 U. S. 539 (1981); *Marshall* v. *Lonberger*, 459 U. S. 422 (1983).

A review of the decisions of 20 States which have grappled with the application of *Witherspoon*[4] shows that appellate courts in 7 of those States grant trial courts considerable discretion in excusing jurors based on their opposition to the death penalty and will disturb such rulings only for a clear abuse of discretion.[5] Six States, including Texas, grant no leeway whatsoever to the trial court. The appellate courts conduct their own review of the record and make their own *de novo* determination of the propriety of any exclusions.[6] The other seven States, without explicitly mentioning any standard, also appear to engage in *de novo* review, combing the record for errors with no mention of, or deference to, the trial court's opportunity to observe the demeanor of the veniremen and hear the tenor of their responses.[7]

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[3] Generally, in matters of jury selection, we have explicitly required deference to the decisions of trial courts. See, *e. g., Irvin* v. *Dowd*, 366 U. S. 717, 723 (1960). But in *Witherspoon* and the cases following it, the language of deference is conspicuous by its absence. Lower appellate courts are thereby left to guess whether the traditional deference has been set aside in this limited context.

[4] Thirty-eight States have a death penalty. In many of those States, however, capital cases are few and far between, and it is impossible to determine the standard of review that would be applied to alleged *Witherspoon* violations. In some other States, although the issue has arisen, it has been dealt with in conclusory terms which do not reveal whether any deference was paid to the trial court's judgment.

[5] *Clines* v. *State*, 280 Ark. 77, 87–88, 656 S. W. 2d 684, 689 (1983); *Hooks* v. *State*, 416 A. 2d 189, 194–195 (Del. 1980); *People* v. *Free*, 94 Ill. 2d 378, 402–403, 447 N. E. 2d 218, 230 (1983); *State* v. *Treadway*, 558 S. W. 2d 646, 649 (Mo.) (en banc), cert. denied, 439 U. S. 838 (1977); *State* v. *Kirkley*, 308 N. C. 196, 206, 302 S. E. 2d 144, 150 (1983); *State* v. *Trujillo*, 99 N. M. 251, 252, 657 P. 2d 107, 108 (1982); *Turner* v. *Commonwealth*, 221 Va. 513, 523, 273 S. E. 2d 36, 43 (1980).

[6] *People* v. *Lanphear*, 26 Cal. 3d 814, 841, 608 P. 2d 689, 703–704 (1980); *Blankenship* v. *State*, 247 Ga. 590, 593, 277 S. E. 2d 505, 509 (1981); *State* v. *George*, 371 So. 2d 762, 765 (La. 1979); *State* v. *Anderson*, 30 Ohio St. 2d 66, 70, 282 N. E. 2d 568, 570 (1972); *State* v. *Harrington*, 627 S. W. 2d 345, 349–350 (Tenn. 1981); *Rougeau* v. *State*, 651 S. W. 2d 739, 740–745 (Tex. Crim. App. 1982) (en banc).

[7] *Ex parte Bracewell*, 407 So. 2d 845, 846–847 (Ala. 1979); *Maggard* v. *State*, 399 So. 2d 973, 976 (Fla. 1981); *Frith* v. *State*, 263 Ind. 100, 107–108, 325

The degree of confusion and the number of conflicting decisions among the state courts on such an important issue of federal constitutional law are troublesome, to say the least. This same disarray exists in federal courts entertaining petitions for writs of habeas corpus under 28 U. S. C. § 2254. For example, a panel of the Court of Appeals for the Fifth Circuit recently split three ways on the question.[8] And the Eleventh Circuit reached opposite results on the proper standard of review in two recent cases and has granted rehearing en banc in one of the cases to consider the issue.[9] I believe this Court has an obligation to clarify its holding in *Witherspoon* and to resolve these conflicts.

Obviously, there is no simple litmus test for determining when a juror would automatically vote against imposition of the death penalty or be unable to make an impartial decision as to the defendant's guilt. Of necessity, therefore, the *voir dire* examination of veniremen in capital cases has become an elaborate and frustrating process. The instant case demonstrates both the difficult position of the trial court and the need for a uniform standard of review of alleged *Witherspoon* violations.

Venireman Arturo Espindola was excluded from the jury based on the following interchange with the State's attorney:[10]

> "Q. Is this belief—you don't believe in the death sentence—as your being part of the jury that would have to inflict the death penalty?
>
> "A. Sir, I don't believe in the death penalty.
>
> "Q. At all?
>
> "A. At all.
>
> . . . . .

N. E. 2d 186, 190 (1975); *Peterson* v. *State*, 242 So. 2d 420, 426 (Miss. 1970); *Bean* v. *State*, 86 Nev. 80, 87, 465 P. 2d 133, 138 (1970); *Jones* v. *State*, 555 P. 2d 1061, 1066 (Okla. Crim. App. 1976); *State* v. *Tyner*, 273 S. C. 646, 651, 258 S. E. 2d 559, 562 (1979).

[8] *O'Bryan* v. *Estelle*, 714 F. 2d 365, 371–373 (1983) (assuming, without deciding, that *de novo* review is proper); *id.*, at 393 (Higginbotham, J., concurring) ("an independent review of the facts may be undertaken against a backdrop of trial court discretion"); *id.*, at 400 (Buchmeyer, J., dissenting) (deference appropriate only if trial judge made "*express* factual or credibility determinations").

[9] Compare *McCorquodale* v. *Balkcom*, 705 F. 2d 1553, 1556–1557, n. 9 (1983), with *Darden* v. *Wainwright*, 699 F. 2d 1031, 1037, rehearing en banc granted, 699 F. 2d 1043 (1983).

[10] A transcript of the *voir dire* examination of venireman Espindola is contained in Appendix C to the petition.

> "Q. And, you could not vote for the death penalty in a case no matter how horrible the facts were?
> "A. No, sir, I could not vote for the death penalty.
> "Q. . . . [Y]ou are irrevocably committed before the trial begins to vote against the death penalty regardless of the facts and circumstances because of your belief?
> "A. That's right." App. to Pet. for Cert. C-3 to C-4.

The State's attorney then explained to Espindola the Texas procedures for capital cases. The guilt and punishment phases are separated, and in the punishment phase the jury never votes directly to impose the death sentence. The jury is instead asked three questions about the nature of the crime and the probability of future violence by the defendant. If the jury answers "yes" to all three questions, the judge must impose the death penalty. Texas Code Crim. Proc. Ann., Art. 37.071(e) (Vernon Supp. 1982-1983). After explaining these procedures and reading the questions to the venireman, the questioning continued.

> "Q. Because you don't believe in the death penalty, then would you automatically vote no to these questions no matter what the facts were to keep the man from getting a death sentence?
> "A. I imagine I would.
> "Q. All right. Because of your beliefs?
> "A. Yes, because of my beliefs.
> "[Q.] And, your belief would have a—would enter into these deliberations because you just don't believe in it, and you could not vote yes and you would vote no, is that right?
> "A. That's right." App. to Pet. for Cert. C-8 to C-9.

Defense counsel then sought to rehabilitate Espindola on cross-examination.

> "Q. And, if the State—the next thing I'll ask you before we get the effect is I will ask you—assume, if you will with me, that the prosecutors prove to you beyond any reasonable doubt that the evidence is there and the questions in your mind, you're convinced beyond any reasonable doubt that the questions should be answered yes, okay?
> "A. Yes, I understand.
> "Q. And, you're convinced of that in your mind beyond any reasonable doubt that the answers should be yes, okay?
> "A. Yes, I understand.

> "Q. And, would you be untruthful in your answer intentionally and would you just deliberately answer the question untruthful—untruthfully or would you answer the question according to what the evidence showed, according to your oath as a juror? Would you just intentionally and deliberately answer the question untruthfully?
> "A. No, I would not.
>
> . . . . .
>
> "Q. So, you wouldn't answer it untruthfully?
> "A. I would not answer untruthfully, no way.
> "Q. So, if you were faced with—the questions that the prosecutor read to you over here, and you either had to answer the questions yes or no, and if you felt in your mind that the answers should be yes, and they have proved that to you beyond any reasonable doubt, and you're required to give a true answer to the questions asked of you, okay?
> "A. Okay
> "Q. Would you, simply because you knew what the effect of your answer would be, simply for that reason, would you deliberately answer those questions untruthful just because you knew what the effect of your answers would be?
> "A. I said before that I wouldn't answer untruthfully." *Id.*, at C–10 to C–12.

Venireman Espindola thus gave directly contradictory answers to the same question posed in different terms by the prosecutor and by defense counsel. This is a classic instance in which the trial judge, based on his own observation of the interchange, is best able to determine whether the venireman could properly discharge his duties as a juror. Yet the Texas Court of Criminal Appeals conducted a *de novo* review of the record and held that the trial court improperly sustained the State's challenge for cause.

I find no support in our case law for the utter absence of deference paid to the trial court's judgment in this case. On the contrary, we have constantly stressed that "actual bias" on the part of a particular juror is a question of "historical fact," *Rushen* v. *Spain*, 464 U. S. 114, 120 (1983), on which the findings of the trial court should not be set aside unless clearly erroneous. See *Dennis* v. *United States*, 339 U. S. 162, 168 (1950) ("while empaneling a jury the trial court has a serious duty to determine the question of actual bias, and a broad discretion in its rulings on challenges therefor"); *Reynolds* v. *United States*, 98 U. S. 145, 156 (1879) ("The finding of the trial court upon that issue ought not to be set aside by a reviewing court, unless the error is manifest"). See also *Smith* v. *Phillips*, 455 U. S. 209, 218 (1982) (findings of trial court on juror bias entitled to presumption of correctness in federal habeas action under 28 U. S. C. § 2254(d)). I see no reason why different principles should apply when the alleged bias concerns the juror's feelings about the death penalty.[11]

The question presented in this case is important, and the Court should provide better guidance to other courts faithfully striving to apply *Witherspoon*. Accordingly, I would grant the petition for certiorari.

No. 83-833. TRANS-CANADA ENTERPRISES, LTD., ET AL. *v.* MUCKLESHOOT INDIAN TRIBE ET AL.; and

No. 83-958. PORT OF TACOMA *v.* PUYALLUP INDIAN TRIBE. C. A. 9th Cir. Motion of Washington Land Title Association for leave to file a brief as *amicus curiae* in No. 83-958 granted. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: No. 83-833, 713 F. 2d 455; No. 83-958, 717 F. 2d 1251.

No. 83-853. JACKSON, INDIVIDUALLY, AND AS ADMINISTRATOR OF THE ESTATE OF JACKSON, ET AL. *v.* CITY OF JOLIET ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 715 F. 2d 1200.

JUSTICE WHITE, with whom JUSTICE REHNQUIST joins, dissenting.

Petitioners, representatives of the estates of individuals killed in a one-car accident in Joliet, Ill., filed complaints in Federal District Court under 42 U. S. C. § 1983 (1976 ed., Supp. V), contending that various county and city officials violated decedents' constitutional rights by failing to save decedents from the burning automobile. In their complaint, petitioners alleged that two minutes after the car swerved off the road and burst into flames, one of the respondents, a police officer, arrived on the scene and began directing traffic around the car. Firemen were summoned, and the fire was extinguished; yet no efforts were made to remove decedents from the car, nor was an ambulance called until some 45 minutes after the accident occurred. The complaint alleged that decedents were still alive when the fire was doused and that had adequate rescue measures been taken at the outset, decedents would have survived.

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[11] In *Adams* v. *Texas*, 448 U. S., at 46, we had occasion to discuss the circumstances under which a potential juror could be excluded under the very Texas statutory scheme at issue in this case.

> "If the juror is to obey his oath and follow the law of Texas, he must be willing not only to accept that in certain circumstances death is an acceptable penalty but also to answer the statutory questions without conscious distortion or bias. The State does not violate the *Witherspoon* doctrine when it excludes prospective jurors who are unable or unwilling to address the penalty questions with this degree of impartiality."

This enunciation of the standard for exclusion makes clear the factbound nature of the inquiry and, hence, the appropriateness of deferring to the judgment of the trial court.

The District Court denied respondents' motion to dismiss the complaints for failure to state a cause of action. The Court of Appeals for the Seventh Circuit, however, reversed, concluding that an attempt by state officers to assist at an accident does not result in the deprivation of a constitutional right when the attempt fails because of the negligence or gross negligence of the officers. 715 F. 2d 1200 (1983).

In reaching its conclusion, the Court of Appeals noted that "[n]o problem so perplexes the federal courts today as determining the outer bounds of section 1 of the Civil Rights Act of 1871, 42 U. S. C. § 1983 . . . ." *Id.*, at 1201. Section 1983 actions have been brought in a variety of contexts by those injured as a result of a state official's failure to exercise adequate care in carrying out his duties. *Clark* v. *Taylor*, 710 F. 2d 4 (CA1 1983); *Morrison* v. *Washington County*, 700 F. 2d 678 (CA11), cert. denied, 464 U. S. 864 (1983); *Hull* v. *Duncanville*, 678 F. 2d 582 (CA5 1982); *Hirst* v. *Gertzen*, 676 F. 2d 1252 (CA9 1982); *Doe* v. *New York City Dept. of Social Services*, 649 F. 2d 134 (CA2 1981), after remand to District Court, 709 F. 2d 782 (CA2 1982), cert. denied *sub nom. Catholic Home Bureau* v. *Doe*, 464 U. S. 864 (1983). The results in these cases have not been entirely consistent. While the Court of Appeals in the present case determined that the State's failure to provide adequate rescue services was not actionable under § 1983, other courts have permitted relief under that section when a foster parent's abuse of his foster child was permitted by the state agency's failure adequately to monitor the foster care environment, *Doe* v. *New York City Dept. of Social Services*, *supra*, and when a patient's death was allegedly caused by the manner in which he was discharged by a state hospital, *Morrison*, *supra*. The inconsistent results below are attributable, at least in part, to the lack of definitive guidelines for determining when tortious conduct by state officials rises to the level of a constitutional tort. This Court should attempt to resolve this "perplexing" issue, and this case provides us with an opportunity to do so. Accordingly, I would grant the petition for certiorari and set the case for oral argument.

No. 83-1039. KINNETT DAIRIES, INC. *v.* DAIRYMEN, INC. C. A. 11th Cir. Motion of National Independent Dairy-Foods Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 715 F. 2d 520.

No. 83-5792. GRIFFIN *v.* TEXAS. Ct. Crim. App. Tex.;
No. 83-5818. CREECH *v.* IDAHO. Sup. Ct. Idaho;
No. 83-5836. WILLIE *v.* LOUISIANA. Sup. Ct. La.;
No. 83-5849. CLINES ET AL. *v.* ARKANSAS. Sup. Ct. Ark.;
No. 83-5897. SHRINER *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir.;
No. 83-5905. FITZPATRICK *v.* FLORIDA. Sup. Ct. Fla.;
No. 83-5909. HARICH *v.* FLORIDA. Sup. Ct. Fla.;
No. 83-5924. JOHNSON *v.* FLORIDA. Sup. Ct. Fla.;
No. 83-5939. DUNKINS *v.* ALABAMA. Sup. Ct. Ala.;
No. 83-5942. KNAPP *v.* ARIZONA. Super. Ct. Ariz., Maricopa County;
No. 83-5955. KNIGHTON *v.* LOUISIANA. Sup. Ct. La.;
No. 83-5973. LIGHTBOURNE *v.* FLORIDA. Sup. Ct. Fla.;
No. 83-5977. MASON *v.* FLORIDA. Sup. Ct. Fla.;
No. 83-5980. SONNIER *v.* MAGGIO, WARDEN. C. A. 5th Cir.;
No. 83-5999. OSBORN *v.* WYOMING. Sup. Ct. Wyo.; and
No. 83-6009. HAYES *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: No. 83-5792, 665 S. W. 2d 762; No. 83-5818, 105 Idaho 362, 670 P. 2d 463; No. 83-5836, 436 So. 2d 553; No. 83-5849, 280 Ark. 77, 656 S. W. 2d 684; No. 83-5897, 715 F. 2d 1452; No. 83-5905, 437 So. 2d 1072; No. 83-5909, 437 So. 2d 1082; No. 83-5924, 438 So. 2d 774; No. 83-5939, 437 So. 2d 1356; No. 83-5955, 436 So. 2d 1141; No. 83-5973, 438 So. 2d 380; No. 83-5977, 438 So. 2d 374; No. 83-5980, 720 F. 2d 401; No. 83-5999, 672 P. 2d 777; No. 83-6009, 280 Ark. 509, 660 S. W. 2d 648.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 83–932. TEXAS INTERNATIONAL AIRLINES, INC. *v.* NATIONAL AIRLINES, INC. C. A. 5th Cir. Motion of petitioners in No. 83–1111, *Heublein, Inc.* v. *General Cinema Corp.*, to consolidate with this petition denied. Certiorari denied. Reported below: 714 F. 2d 533.

No. 83–962. MEAT PRICE INVESTIGATORS ASSN. ET AL. *v.* SAFEWAY STORES, INC., ET AL. C. A. 5th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 710 F. 2d 216.

No. 83–991. ALUMINUM COMPANY OF AMERICA ET AL. *v.* UTILITIES COMMISSION OF NORTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. JUSTICE BRENNAN and JUSTICE WHITE would grant certiorari. Reported below: 713 F. 2d 1024.

No. 83–1023. DATA PROBE ACQUISITION CORP. ET AL. *v.* DATATAB, INC., ET AL. C. A. 2d Cir. Certiorari denied. JUSTICE POWELL would grant certiorari. Reported below: 722 F. 2d 1.

No. 83–5874. WITHERS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. JUSTICE BRENNAN and JUSTICE MARSHALL would grant certiorari. Reported below: 115 Ill. App. 3d 1077, 450 N. E. 2d 1323.

No. 83–5956. JUSTUS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 438 So. 2d 358.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Petitioner Justus was sentenced to death through the retroactive application of a statutory aggravating factor in violation of the Federal Constitution's prohibition against *ex post facto* punishments. U. S. Const., Art. I, § 9, cl. 3; Art. I, § 10, cl. 1. The murder for which petitioner was convicted occurred in 1978. In 1979, Florida added a new aggravating factor to the State's death penalty statute. As a result of the amendment, a judge and jury could for the first time consider during the sentencing stage of trial whether the homicide was "committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." 1979 Fla. Laws, ch. 79–353 (codified at Fla. Stat. § 921.141(5)(i) (1981)). In 1980, petitioner was convicted of first-degree murder and sentenced to death. In imposing the death penalty, the Florida Circuit Judge relied on two aggravating factors, one of which was the factor added to the Florida death penalty statute after petitioner committed his crime.

In *Weaver* v. *Graham*, 450 U. S. 24, 30 (1981), this Court held that a change in sentencing procedures violates the Constitution's prohibition against *ex post facto* punishments "if it is both retrospective and more onerous than the law in effect on the date of the offense." Both the Florida Supreme Court and the State's Attorney General concede that the constitutionality of applying Florida's new aggravating factor to petitioner must be measured by the *Weaver* test. See *Combs* v. *State*, 403 So. 2d 418, 421 (Fla. 1981), cert. denied, 456 U. S. 984 (1982), quoted in 438 So. 2d 358 (Fla. 1983); Brief in Opposition 4.

The State's sole argument is that the application of this new aggravating factor had no detrimental effect on petitioner, and therefore was not onerous under *Weaver*. See 438 So. 2d, at 368. The State's view is that, since premeditation was already an element of first-degree murder, the retroactive application of Florida's new aggravating factor placed no additional burden on petitioner. Indeed, the Florida Supreme Court has taken the peculiar position that this new factor "inure[s] to the benefit of a defendant" because the factor adds to premeditation the limitations of "cold, calculated and . . . without . . . moral or legal justification." *Combs* v. *State*, *supra*, at 421.

The State's position is simply untenable. A Florida Circuit Judge relied upon Florida's new aggravating factor to sentence petitioner to death. Before 1979, the Florida death penalty statute contained no aggravating factor analogous to the one added by 1979 Fla. Laws, ch. 79–353. Had the new factor not been applied at petitioner's sentencing trial, the sentencing judge would have found only one aggravating factor, and it is impossible to know whether he still would have chosen to impose the death penalty. The application of the new aggravating factor made it easier for the Florida judge to sentence petitioner to death, and for that reason alone was more onerous for petitioner than the sentencing procedure in place at the date of his offense. See *Weaver* v. *Graham*, *supra*.

The detrimental effect of 1979 Fla. Laws, ch. 79–353, on petitioner is in no way ameliorated by the fact that premeditation was an element of petitioner's underlying conviction. For one thing, "homicide . . . committed in a cold, calculated and premeditated manner without any . . . moral or legal justification" is not synonymous with premeditated murder. If the language of 1979 Fla. Laws, ch. 79–353, is to carry its natural meaning, the new aggravating factor covers crimes that are more ruthless and cold-blooded than ordinary first-degree murder.

More importantly, defending an aggravating factor by reference to elements of the underlying offense is inconsistent with this Court's prior death penalty decisions. The sole purpose of requiring a sentencing authority to balance aggravating factors against mitigating circumstances is to force the sentencer to look beyond the offense to determine whether capital punishment is warranted given the totality of the circumstances surrounding the crime. By amending its death penalty statute, Florida changed the ground rules for judging the totality of the circumstances. This change most definitely prejudiced petitioner.

As the State itself concedes, "[w]hether a retrospective state criminal statute ameliorates or worsens conditions imposed by its predecessor is a federal question." Brief in Opposition 3. Because I believe that the Florida Supreme Court incorrectly decided this question, I would grant the petition and vacate the sentence.* I dissent.

No. 83–6042. JOHNSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. JUSTICE BLACKMUN would grant certiorari. Reported below: 465 A. 2d 843.

Rehearing Denied

No. 82–2004. NIBUNGCO *v.* UNITED STATES, 464 U. S. 823;

No. 83–561. MORETTI ET AL. *v.* MULTI-PAK CORP. ET AL., 464 U. S. 988;

No. 83–662. GAINES *v.* MERCHANTS NATIONAL BANK & TRUST CO., 464 U. S. 1013; and

No. 83–668. PACE *v.* SOUTHERN RAILWAY CO., 464 U. S. 1018. Petitions for rehearing denied.

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*Adhering to my view that the death penalty is under all circumstances cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments, I would vacate the judgment of the Supreme Court of Florida insofar as it left undisturbed the death sentence imposed in this case. *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting).

No. 83-709. **Walton** *v.* **Small Business Administration**, 464 U. S. 1009;

No. 83-5448. **Williams** *v.* **Pierce, Secretary of Housing and Urban Development, et al.**, 464 U. S. 1046;

No. 83-5460. **Betka** *v.* **City of West Linn et al.**, 464 U. S. 979;

No. 83-5536. **Kajevic** *v.* **United States**, 464 U. S. 1047;

No. 83-5572. **McMillan** *v.* **Hester et al.**, 464 U. S. 1010;

No. 83-5624. **Morvay** *v.* **Maghielse Tool & Die Co., Inc.**, 464 U. S. 1011;

No. 83-5633. **Brown** *v.* **Rice et al.**, 464 U. S. 1019;

No. 83-5634. **In re Brown**, 464 U. S. 1006;

No. 83-5638. **Skaggs et al.** *v.* **Crawford County, Ohio, et al.**, 464 U. S. 1019; and

No. 83-5793. **Howell** *v.* **Appling**, 464 U. S. 1072. Petitions for rehearing denied.

No. 82-2083. **Rushen, Director, California Department of Corrections, et al.** *v.* **Spain**, 464 U. S. 114. Motion of American Civil Liberties Foundation et al. for leave to file a brief as *amici curiae* in support of petition for rehearing denied. Petition for rehearing denied. Justice Brennan would grant the motion.

No. 83-5374. **Jones et al.** *v.* **Superior Court of California, Orange County**, 464 U. S. 998. Motion for leave to file petition for rehearing denied.

February 27, 1984

Appeals Dismissed

No. 83-770. **City of New York et al.** *v.* **United States Department of Transportation et al.** Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Justice Rehnquist took no part in the consideration or decision of this case. Reported below: 715 F. 2d 732.

No. 83-918. **Carter** *v.* **Illinois**. Appeal from Sup. Ct. Ill. dismissed for want of substantial federal question. Reported below: 97 Ill. 2d 133, 454 N. E. 2d 189.

No. 83–1081. FINVOLD ET AL. *v.* SAMBS ET AL. Appeal from Ct. App. Cal., 4th App. Dist., dismissed for want of substantial federal question.

No. 83–1098. ESCONDIDO IMPORTS, INC., ET AL. *v.* CALIFORNIA DEPARTMENT OF MOTOR VEHICLES. Appeal from Ct. App. Cal., 4th App. Dist., dismissed for want of substantial federal question. Reported below: 145 Cal. App. 3d 834, 193 Cal. Rptr. 772.

No. 83–1006. VAUGHTER *v.* TENNESSEE. Appeal from Ct. Crim. App. Tenn. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 83–5408. INCHAUSTI *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. Appeal from C. A. 5th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

Certiorari Granted—Vacated and Remanded

No. 83–706. LEHMAN, SECRETARY OF THE NAVY, ET AL. *v.* TROUT ET AL. C. A. D. C. Cir. Certiorari granted, judgment vacated, and case remanded to the Court of Appeals with instructions to remand the case to the District Court for the District of Columbia for findings of fact, based on new evidence if necessary, on the question what evidentiary value respondents' and petitioners' statistical evidence has in light of the Court of Appeals' conclusions of law concerning employment decisions that are not actionable in this case. See *Pullman-Standard* v. *Swint*, 456 U. S. 273, 292 (1982). The overall sufficiency of the evidence should then be considered in light of *United States Postal Service Bd. of Governors* v. *Aikens*, 460 U. S. 711 (1983). Reported below: 226 U. S. App. D. C. 357, 702 F. 2d 1094.

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

This litigation began in 1973. In four consolidated cases a class of female professional employees employed by the Naval Command Support Activity of the Navy Regional Data Automation

Center (NAVCOSSACT/NARDAC) alleged that petitioners discriminated against them on the basis of their sex in violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. §§2000e to 2000e–17. After a long trial—the record includes the testimony of 42 witnesses and over 7,500 pages of exhibits[1]—the District Court found discrimination in both hiring and promotion. *Trout* v. *Hidalgo*, 517 F. Supp. 873 (DC 1981). The findings were supported by statistical evidence, expert testimony, and nonstatistical evidence covering specific instances of discrimination.

The Court of Appeals affirmed the District Court's finding of discrimination in promotion, but held that petitioners were not responsible for the hiring discrimination that had been proved—another federal agency[2] had done the discriminatory hiring—and also that petitioners were not liable for discriminatory conduct prior to 1972. 226 U. S. App. D. C. 357, 702 F. 2d 1094 (1983). Thus, the "employment decisions that are not actionable in this case" are (1) hiring decisions, and (2) pre-1972 discrimination. The order the Court enters today requires that this case be remanded to the District Court for additional findings of fact on the evidentiary value of respondents' statistical evidence in the light of these two conclusions. The Court's decision overlooks the fact that both the District Court and the Court of Appeals have already done exactly what the Court orders.

The Court of Appeals has already considered the impact of both of the District Court's errors on its findings concerning discrimination in promotion, and has squarely held that those findings are adequately supported by the remaining evidence. Thus, with respect to the pre-1972 discrimination, the Court of Appeals stated:

> "By grouping nonactionable *hiring* decisions with those for which NAVCOSSACT/NARDAC could properly be held liable, certain of the plaintiffs' statistical analyses hold the potential for some distortion concerning the adverse impact of the appellants' post-1972 promotion policies. However, it is clear that the plaintiffs did not rely solely on data regarding

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[1] At least respondents have so represented; I have not examined the record myself because it has not been filed in this Court.

[2] The Civil Service Commission, which later became the Office of Personnel Management.

> nonactionable hiring decisions; indeed, there is no doubt whatsoever that the plaintiffs' statistical analyses included a substantial amount of data concerning post-1972 employment decisions affecting class members. For these reasons, we do not believe that 'failure to factor out time-barred discrimination discredited the analyses. Statistics tuned to the proper time period are more probative than statistics not so tuned, but categorical rejection of the latter is not warranted.' *Valentino* v. *United States Postal Service*, [218 U. S. App. D. C. 213, 228, n. 26, 674 F. 2d 56, 71, n. 26 (1982)]. The approach to statistics adopted by the Supreme Court in *Hazelwood* [*School District* v. *United States*, 433 U. S. 299, 309–310 (1977)], and *International Brotherhood of Teamsters* v. *United States*, 431 U. S. [324, 360 (1977)], plainly suggests that statistics including time-barred decisions are 'sufficient to support a prima facie case and shift the burden to the defendant to show that its actions during the relevant period rebut the inference of discrimination raised by the plaintiff's broad summary.' *Movement for Opportunity & Equality* v. *General Motors Corp.*, 622 F. 2d 1235, 1258 (7th Cir. 1980).
>
> "Although the appellants did attempt to make such a showing, the trial court found their statistical evidence defective on other grounds. We can find no basis upon which to overturn Judge Greene's findings on this point. Therefore, we agree that the appellants' evidence was incapable of raising a genuine issue concerning the validity of the inference of discrimination raised by the plaintiffs' statistical presentation. As a result, NAVCOSSACT/NARDAC was left with only an unquantified theoretical objection that could not undermine the prima facie case. *See* II Jt. App. 743–744." *Id.*, at 367, 702 F. 2d, at 1104 (emphasis in original; footnote omitted).

With respect to the fact that the Civil Service Commission, rather than petitioners, was responsible for the hiring discrimination, the Court of Appeals wrote:

> "We conclude, therefore, that the District Court erred in holding that the class was entitled to relief for discriminatory *initial placements*.
>
> "This does not mean, however, that the plaintiffs' statistics could not make out a legally sufficient prima facie case of discrimination *in promotions*. Because NAVCOSSACT/

> NARDAC did not quantify the extent to which the disparity between men and women revealed by the plaintiffs' statistics was attributable to the locked-in effects of nonactionable discrimination, *see, e. g.*, IV Jt. App. 1829, the plaintiffs' statistical analyses created a justifiable inference that the defendants had 'failed to promote equitably individuals who were discriminated against at hiring,' or had slowed the progress of women who had initially been properly placed." *Id.*, at 368, 702 F. 2d, at 1105 (emphasis in original) (citation omitted).[3]

Thus, the Court of Appeals carefully considered the effect of the District Court's errors, and found that the remaining evidence was nevertheless sufficient to support a finding of discrimination. I take the Court's citation of *Pullman Standard* v. *Swint*, 456 U. S. 273, 292 (1982), to mean that it believes that the Court of Appeals found the facts on these two points, rather than permitting the District Court to do so in the first instance. If that is the basis for the Court's disposition, it is mistaken. The District Court clearly found that even when only post-1972 evidence was considered, respondents had demonstrated the existence of unlawful discrimination both through statistical[4] and nonstatistical[5] evidence. Moreover, the District Court found that even if the actions of the Civil Service Commission were nonactionable, the evidence concerning the actions of NARDAC alone still demonstrated the existence of unlawful discrimination.[6] Most important, the District Court explicitly noted that respondents' statistics demonstrated that during the post-Act period female employees were paid consistently less than male employees even when the factors used by the Civil Service Commission to make placement decisions were considered.[7] This is simply not a case in which a court of

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[3] The Court of Appeals also emphasized that nonstatistical evidence supported the District Court's findings. It stated: "The District Court also found persuasive the testimony of a number of class members. Although we do not specifically discuss this testimony, the District Court properly considered the statistical and nonstatistical evidence on a cumulative basis in assessing the strength of the plaintiffs' prima facie case. *EEOC* v. *American Nat'l Bank*, 652 F. 2d 1176, 1188–89 (4th Cir. 1981), *cert. denied*, [459 U. S. 923] (1982)." 226 U. S. App. D. C., at 362, n. 7, 702 F. 2d, at 1099, n. 7.

[4] The District Court found:

"Plaintiffs' expert also performed several variant regressions, including running of the 1979 model using a population of employees hired only since 1972, when Title VII became applicable to federal employees; running of the 1979 model using subpopulations categorized by agency origin within NARDAC; and running of data for both 1977 and 1979 using a logarithmic, rather than a linear, equation. Each of these variants produced *statistically significant* results which were wholly consistent with those of the basic model." *Trout* v. *Hidalgo*, 517 F. Supp. 873, 879, n. 14 (DC 1981) (emphasis supplied).

[5] "There was testimony from a number of present and former employees of NARDAC concerning various discriminatory practices, long after 1972, including a denial of supervisory opportunities to women, assignment of women to lower level positions, and the preselection of men for supervi-

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sory positions. The Court was especially impressed by the testimony of several former employees of the agency who were very credible witnesses and who related both specific instances and general impressions of discrimination against women at NARDAC. Some of these individuals left NARDAC for other federal employment and thereafter advanced to higher grades far more rapidly than had been possible at NARDAC." *Id.*, at 887 (footnotes omitted).

[6] "The government appears to justify . . . ignoring of possible discrimination in initial placement with the argument that NARDAC had no influence on placement decisions, which were allegedly completely controlled by the Civil Service Commission, and that NARDAC therefore would not be legally liable for any bias at the time of hiring. However, whatever may have been the formalistic Civil Service classification system, defendants failed to demonstrate that NARDAC had no influence on initial grade placement decisions. In fact, the interplay among job description, assignment to positions, distribution of duties, and classification standards leaves ample room for flexible treatment and hence for variation and discrimination.

"Furthermore, even if all authority for improper initial grade placement were assumed to rest with the Civil Service Commission, the resulting disparities in grade level remaining over several years could still be properly attributable to NARDAC. In such a case, either NARDAC failed to promote equitably individuals who were discriminated against at hiring (which would constitute direct discrimination by NARDAC) or operation of the Whitten Amendment regulations locked in the effects of earlier discrimination. In either event, the assumption implicit in defendants' statistics that discrimination in initial placement is irrelevant to their case is incorrect and undermines their analysis." *Id.*, at 885 (citations omitted).

[7] "Plaintiffs' expert began his analysis with the undisputed fact that the average salary for female employees at NARDAC has thoughout the relevant period been considerably lower than that of males. At the beginning of that period, in 1972, women earned $2,700 less than men, that is, 82 percent of the male salaries; at the end of the period, in 1979, women earned $4,300 less than men, or 84 percent of the male salaries. The salary differentials throughout this period reflect the relative concentration of women in NARDAC in the lower civil service grade levels. . . .

"With these salary differentials clearly established, plaintiffs' expert sought to determine next, on a year-by-year basis between 1972 and 1979, whether appeals has improperly found the facts in the first instance. Thus, we have a finding of fact that has been reviewed and upheld by a Court of Appeals. Our customary practice is to accord such a finding the greatest respect even in cases that have been fully briefed and argued in this Court. See, *e. g.*, *Rogers* v. *Lodge*, 458 U. S. 613, 623 (1982); *Neil* v. *Biggers*, 409 U. S. 188, 193, n. 3 (1972); *Berenyi* v. *Immigration Director*, 385 U. S. 630, 635 (1967). To set such a finding aside without even looking at the record, or at any of the evidence on which it is based, strikes me as a gross violation of the procedures that should constrain our work.

Two other observations concerning the Court's action today are appropriate. First, the strong interest in bringing protracted litigation to a conclusion seems to have no impact on this Court. See *Pennhurst State School and Hospital* v. *Halderman*, *ante*, p. 126 (STEVENS, J., dissenting). The Court's action today encourages the kind of litigating strategy that gives the party with the greater resources a significant advantage unrelated to the merits of the case. The kind of casual command to begin anew that is reflected in today's order tends to undermine the ability of trial judges to exercise firm control over the progress of litigation.[8] Moreover, this action can only encourage parties to file

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the disparity could be accounted for by differences between men and women in education and experience, or whether it was more likely to be attributable to sex discrimination. To accomplish this analysis, the expert witness specified for regression a linear model which included dummy variables for level of education, years of NARDAC service, years of other government employment service, years of potential nongovernment experience between date of receipt of last educational degree and date of entry in federal service, and sex. The dependent variable was sex.

"When prior experience and education were thus taken into account, female employees still received substantially lower salaries than men, the yearly differential attributable to sex ranging from $2,200 to $3,500. Since there was never any suggestion by the government that factors other than education or experience could legitimately account for the differences, the Court would clearly have been justified, absent some explanation, to draw the conclusion that equally qualified female employees of NARDAC consistently received lower salaries on the average than male employees and, accordingly, that they had been the victims of improper discrimination." *Id.*, at 878–879 (footnotes omitted).

[8] Petitioners' conduct of this litigation has hardly been a model for future cases. The most persuasive evidence on which petitioners relied in their argument before this Court was not adduced until they filed a motion for reconsideration well after the District Court had decided the case. The Court

more and more petitions asking this Court to engage in factual disputes that we are not equipped to resolve effectively.

Second, this case illustrates the dangers inherent in an excessive reliance on summary dispositions. The District Court and the Court of Appeals had the benefit of extensive briefing, a complete record, and several months of consideration of this case. Today, in summary fashion, we second-guess their considered judgment as to the probative value of respondents' evidence after the most truncated of presentations. It is, of course, entirely possible that the Court has issued the right command as it gallops by this immense record. But if that be true, the Court is just lucky.

I respectfully dissent.

Miscellaneous Orders

No. ———. GRONER *v.* SLEZAK ET AL. Motion to direct the Clerk to docket an appeal out of time denied.

No. A–660. PINE KNOB INVESTMENT CO. ET AL. *v.* COLLINS, TRUSTEE. Bkrtcy. Ct. E. D. Mich. Application for stay, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

No. D–365. IN RE DISBARMENT OF RAYBURN. Disbarment entered. [For earlier order herein, see 464 U. S. 911.]

No. D–371. IN RE DISBARMENT OF JONES. Disbarment entered. [For earlier order herein, see 464 U. S. 911.]

No. D–376. IN RE DISBARMENT OF GOLDSTEIN. Disbarment entered. [For earlier order herein, see 464 U. S. 926.]

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of Appeals agreed with Judge Greene that petitioners should have adduced this evidence during trial. Indeed, it found petitioners' conduct indefensible: "We would add that we find it extremely troublesome—in light of the long and complex history of this litigation and in light of Judge Greene's patient and thoughtful treatment of the case—that the appellants would even propose that the trial court reopen and retry the matter. In the context of this case setting, such an adversarial tactic is irresponsible, insensitive to the extraordinary burdens faced by district courts already overloaded with heavy dockets, and wasteful of precious resources of litigants and the judiciary. Viewed in this posture, we consider the appellants' request for reconsideration an affront to the judicial system." 226 U. S. App. D. C., at 369, 702 F. 2d, at 1106–1107.

No. D–378. In re Disbarment of Lorenzo. Disbarment entered. [For earlier order herein, see 464 U. S. 926.]

No. D–386. In re Disbarment of Perlow. Disbarment entered. [For earlier order herein, see 464 U. S. 958.]

No. D–388. In re Disbarment of Goldburn. Disbarment entered. [For earlier order herein, see 464 U. S. 980.]

No. D–402. In re Disbarment of Young. It is ordered that Nancy J. Young, of Cos Cob, Conn., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring her to show cause why she should not be disbarred from the practice of law in this Court.

No. D–403. In re Disbarment of Cunningham. It is ordered that Patrick J. Cunningham, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–404. In re Disbarment of Mirrer. It is ordered that Raymond Mirrer, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–406. In re Disbarment of Goldstein. It is ordered that Julian M. Goldstein, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–407. In re Disbarment of Cates. It is ordered that Edward L. Cates, of Canton, Miss., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 65, Orig. Texas *v.* New Mexico. Report of the Special Master received and ordered filed. Exceptions to the Report, with supporting briefs, may be filed by the parties within 45 days. Replies thereto, with supporting briefs, may be filed within 30 days. Request of the Special Master to be discharged is granted, and it is ordered that the Honorable Jean Sala Breitenstein is discharged as Special Master in this case. [For earlier decision herein, see, *e. g.*, 462 U. S. 554.]

No. 82–2113. RICHARDSON *v.* UNITED STATES. C. A. D. C. Cir. [Certiorari granted, 464 U. S. 890.] Motion of the Solicitor General to permit Michael W. McConnell, Esquire, to present oral argument *pro hac vice* granted.

No. 83–328. MABRY, COMMISSIONER, ARKANSAS DEPARTMENT OF CORRECTION *v.* JOHNSON. C. A. 8th Cir. [Certiorari granted, 464 U. S. 1017.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 83–317. BLOCK, SHERIFF OF THE COUNTY OF LOS ANGELES, ET AL. *v.* RUTHERFORD ET AL. C. A. 9th Cir. [Certiorari granted, 464 U. S. 959.] Motion of New York City Board of Correction for leave to file a brief as *amicus curiae* granted.

No. 83–850. UNITED STATES *v.* KARO ET AL. C. A. 10th Cir. [Certiorari granted, 464 U. S. 1068.] Motion for appointment of counsel granted, and it is ordered that respondent Gene R. Rhodes is allowed to proceed *in forma pauperis* and that Roger Barges, Esquire, of Albuquerque, N. M., be appointed to serve as counsel for respondent Gene R. Rhodes in this case. JUSTICE BLACKMUN dissents.

No. 83–916. UNITED STATES *v.* MORTON. C. A. Fed. Cir. [Certiorari granted, *ante*, p. 1004.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 83–1084. VISTA RESOURCES, INC., ET AL. *v.* SEA-GRAVE CORP. C. A. 2d Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 83–6111. IN RE BERS. Petition for writ of mandamus denied.

Certiorari Granted

No. 83–990. SCHOOL DISTRICT OF THE CITY OF GRAND RAPIDS ET AL. *v.* BALL ET AL. C. A. 6th Cir. Certiorari granted. Reported below: 718 F. 2d 1389.

No. 83–1097. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* TURNER ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 707 F. 2d 1109.

No. 83-997. TRANS WORLD AIRLINES, INC. *v.* THURSTON ET AL. C. A. 2d Cir. Motion of Chamber of Commerce of the United States for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 713 F. 2d 940.

Certiorari Denied. (See also Nos. 83-770, 83-1006, and 83-5408, *supra.*)

No. 83-671. KATTAN-KASSIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 708 F. 2d 732.

No. 83-722. MEYER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 715 F. 2d 498.

No. 83-734. BAYOU DES FAMILLES DEVELOPMENT CORP. *v.* UNITED STATES CORPS OF ENGINEERS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 709 F. 2d 713.

No. 83-772. SNOWSHOE CO. *v.* KRUSE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 715 F. 2d 120.

No. 83-845. ILLINOIS *v.* POLOVCHAK ET UX.; and

No. 83-5951. POLOVCHAK ET AL. *v.* POLOVCHAK ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 97 Ill. 2d 212, 454 N. E. 2d 258.

No. 83-863. MID-AMERICA TELEVISION CO. ET AL. *v.* STATE TAX COMMISSION OF MISSOURI ET AL.; and WELLS ALUMINUM, INC. *v.* ADMINISTRATIVE HEARING COMMISSION. Sup. Ct. Mo. Certiorari denied. Reported below: 652 S. W. 2d 674 (first case); 652 S. W. 2d 687 (second case).

No. 83-867. EAST CHICAGO REHABILITATION CENTER, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 710 F. 2d 397.

No. 83-879. GRACE *v.* UNITED STATES PUBLIC HEALTH SERVICE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 714 F. 2d 129.

No. 83-900. JONES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 722 F. 2d 735.

No. 83-948. CONNOLLY *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 716 F. 2d 882.

No. 83-982. BRIDGES ET AL. *v.* MCLENNAN COUNTY, TEXAS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 710 F. 2d 220.

No. 83-989. JAMES ET AL. *v.* TENNESSEE VALLEY AUTHORITY ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 704 F. 2d 613 and 714 F. 2d 1066.

No. 83-1005. SPAULDING *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 114 Ill. App. 3d 1154, 459 N. E. 2d 699.

No. 83-1054. GRIMM *v.* LEINART ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 705 F. 2d 179.

No. 83-1087. CAMPBELL *v.* COAL PROCESSING EQUIPMENT, INC. C. A. 6th Cir. Certiorari denied. Reported below: 716 F. 2d 902.

No. 83-1092. BOFFA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 723 F. 2d 899.

No. 83-1100. BATTAGLIA *v.* COMMITTEE OF BAR EXAMINERS OF THE STATE BAR OF CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 83-1104. CITY OF NEWARK *v.* TOWNSHIP OF WEST MILFORD. Super. Ct. N. J., App. Div. Certiorari denied.

No. 83-1105. LEWIS *v.* PENNSYLVANIA. Pa. Commw. Ct. Certiorari denied. Reported below: 73 Pa. Commw. 607, 458 A. 2d 1053.

No. 83-1111. HEUBLEIN, INC. *v.* GENERAL CINEMA CORP. C. A. 2d Cir. Certiorari denied. Reported below: 722 F. 2d 29.

No. 83-1115. KREZDORN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 718 F. 2d 1360.

No. 83-1123. VAN WEY *v.* O'NEAL ET AL. Sup. Ct. Ky. Certiorari denied. Reported below: 656 S. W. 2d 731.

No. 83-1125. GORTMAKER *v.* OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 295 Ore. 505, 668 P. 2d 354.

No. 83-1167. MOUNTAINSIDE BUTTER & EGG CO. *v.* UNITED STATES DEPARTMENT OF AGRICULTURE. C. A. 3d Cir. Certiorari denied. Reported below: 722 F. 2d 733.

No. 83–1174. DIAMOND SHAMROCK CHEMICALS CO. ET AL. *v.* RYAN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 725 F. 2d 858.

No. 83–1175. GORST *v.* BLOCK, SECRETARY OF AGRICULTURE. C. A. 10th Cir. Certiorari denied.

No. 83–1199. HOMSAPAYA *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 723 F. 2d 916.

No. 83–1206. MEKIC *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 720 F. 2d 669.

No. 83–1208. LEE *v.* BURGER, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, ET AL. C. A. 9th Cir. Certiorari denied.

No. 83–1233. BOWDEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 723 F. 2d 911.

No. 83–1239. KASICK ET AL. *v.* BLOCK, SECRETARY OF AGRICULTURE, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 717 F. 2d 459.

No. 83–1253. MORRIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 725 F. 2d 669.

No. 83–1256. KING *v.* MALONE, TRUSTEE. C. A. 5th Cir. Certiorari denied. Reported below: 718 F. 2d 1095.

No. 83–5703. GONZALEZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 707 F. 2d 1250.

No. 83–5717. GUYON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 717 F. 2d 1536.

No. 83–5729. SANTANA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1442.

No. 83–5744. SHAW *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 701 F. 2d 367 and 714 F. 2d 544.

No. 83–5772. MCQUEEN *v.* RAMSEY, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 719 F. 2d 405.

No. 83–5790. HOBBS *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 655 S. W. 2d 472.

No. 83-5795. SCHINDLER *v.* CLERK OF CIRCUIT COURT, CHIPPEWA COUNTY, WISCONSIN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 715 F. 2d 341.

No. 83-5820. FLOMENHOFT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 714 F. 2d 708.

No. 83-5844. ALBRIGHT *v.* BORDENKIRCHER, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 711 F. 2d 1049.

No. 83-5848. DOLL *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 113 Ill. App. 3d 1168, 457 N. E. 2d 172.

No. 83-5889. MCGILL *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 2d Cir. Certiorari denied. Reported below: 712 F. 2d 28.

No. 83-5919. MEYER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 717 F. 2d 1398.

No. 83-5958. KEEFE, AS GUARDIAN AD LITEM AND NEXT FRIEND OF THREE JUVENILES *v.* MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 390 Mass. 357, 455 N. E. 2d 1203.

No. 83-5963. KANE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 717 F. 2d 1334.

No. 83-5992. ISRAEL ET UX. *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. Reported below: 710 F. 2d 601.

No. 83-6011. WRIGHT ET AL. *v.* LONDON GROVE TOWNSHIP. C. A. 3d Cir. Certiorari denied. Reported below: 723 F. 2d 897.

No. 83-6014. LUCIEN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 116 Ill. App. 3d 1172, 462 N. E. 2d 1294.

No. 83-6015. FRANKLIN *v.* MCKASKLE, ACTING DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 83-6027. EUBANKS *v.* MCKASKLE, ACTING DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 83-6028. BLANKNER *v.* CITY OF CHICAGO ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 720 F. 2d 681.

No. 83-6029. BROWN *v.* WALLACE ET AL. C. A. 5th Cir. Certiorari denied.

No. 83-6030. ARCHIBALD *v.* TEXAS. Ct. App. Tex., 14th Sup. Jud. Dist. Certiorari denied.

No. 83-6040. WEIKER *v.* SOUTH DAKOTA. Sup. Ct. S. D. Certiorari denied. Reported below: 342 N. W. 2d 7.

No. 83-6049. PLATEL *v.* MAGUIRE, VOORHIS & WELLS ET AL. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 436 So. 2d 303.

No. 83-6055. VAN SANT *v.* ARLINGTON COUNTY, VIRGINIA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 716 F. 2d 899.

No. 83-6073. SQUIRES *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied.

No. 83-6077. PEEDIN *v.* DEPARTMENT OF THE NAVY. C. A. Fed. Cir. Certiorari denied. Reported below: 723 F. 2d 68.

No. 83-6096. LAYTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 720 F. 2d 548.

No. 83-6099. GATES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 722 F. 2d 741.

No. 83-6113. CAMPBELL *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 281 Ark. 13, 660 S. W. 2d 926.

No. 83-6124. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 721 F. 2d 816.

No. 83-6132. EDRINGTON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 725 F. 2d 670.

No. 83-6137. LAVOIE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 721 F. 2d 407.

No. 83-6145. PALAZZO *v.* GULF OIL CORP. Temp. Emerg. Ct. App. Certiorari denied.

No. 83-6158. CATANZARO *v.* HART ELECTRONICS CORP. C. A. Fed. Cir. Certiorari denied. Reported below: 723 F. 2d 68.

No. 83-6163. SPRAGUE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 723 F. 2d 917.

No. 83-6171. KELLY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 722 F. 2d 873.

No. 83-6175. GASDIEL *v.* LANE, DIRECTOR, ILLINOIS DEPARTMENT OF CORRECTIONS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 725 F. 2d 687.

No. 83-634. CALIFORNIA DEPARTMENT OF CORRECTIONS *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 717 F. 2d 466.

JUSTICE REHNQUIST, dissenting.

Weldon Wiggins, an inmate in the California prison system, was also plaintiff in a civil action pending in the United States District Court for the Northern District of California. At his behest, a writ of habeas corpus *ad testificandum* was issued requiring the State to produce him so that he might attend the trial of his civil action. The State was ordered to bear all the expenses associated with transporting and securing the presence of Wiggins at the trial. The State appealed, claiming that it should be reimbursed by the United States Marshal in light of this Court's decision in *United States* v. *New York Telephone Co.*, 434 U. S. 159 (1977). The Court of Appeals for the Ninth Circuit affirmed the District Court's order. *Wiggins* v. *County of Alameda*, 717 F. 2d 466 (1983).

In so holding, the Court of Appeals relied on *Story* v. *Robinson*, 689 F. 2d 1176 (CA3 1982), and sought to distinguish *Ballard* v. *Spradley*, 557 F. 2d 476 (CA5 1977), and *Ford* v. *Carballo*, 577 F. 2d 404 (CA7 1978). In *Story*, *supra*, the Court of Appeals for the Third Circuit affirmed a District Court order requiring the State to produce, at its own expense, a state prisoner called as a witness in a federal civil suit. In *Ford*, *supra*, the Court of Appeals for the Seventh Circuit held that requiring the State to bear the entire financial burden of producing an incarcerated civil plaintiff at his federal-court trial would be an "unreasonable burden" under the language of *United States* v. *New York Telephone Co., supra.* In *Ballard, supra,* the Court of Appeals for the Fifth Circuit rejected the argument of the United States that the State of Florida should bear the entire financial burden of securing the attendance of an incarcerated civil plaintiff at his trial in federal court.

No one doubts the availability of writs of habeas corpus *ad testificandum* in appropriate circumstances; as the Court of Appeals pointed out in its opinion in this case, authority to issue such a writ is expressly conferred by 28 U. S. C. § 2241(c)(5). But the question of who shall bear the financial burden of securing a prisoner's attendance—an increasingly important question in view of the mounting number of prisoners' petitions for writs of habeas corpus and civil rights complaints—is entirely separate from the question of whether federal courts may issue such writs. Because the Courts of Appeals for the Fifth and Seventh Circuits apparently take a narrower view of their authority to impose costs on the State than do the Courts of Appeals for the Third and Ninth Circuit, I would grant certiorari in this case and resolve the conflict.

No. 83-835. JOHNSON CITY CENTRAL SCHOOL DISTRICT ET AL. *v.* QUACKENBUSH ET AL. C. A. 2d Cir. Motion of Western New York Disability Law Coalition for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 716 F. 2d 141.

No. 83-1057. DIGILIO *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Certiorari denied. JUSTICE BRENNAN took no part in the consideration or decision of this petition.

No. 83-1102. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS *v.* HUTCHINS. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 715 F. 2d 512.

No. 83-1130. BAIR, DIRECTOR, IOWA DEPARTMENT OF REVENUE, ET AL. *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. Sup. Ct. Iowa. Motion of Iowa Farm Bureau Federation for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 338 N. W. 2d 338.

No. 83-5352. MURPHY *v.* KENTUCKY; and

No. 83-5662. PHILLIPS *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: No. 83-5352, 652 S. W. 2d 69; No. 83-5662, 655 S. W. 2d 6.

JUSTICE WHITE, with whom JUSTICE BRENNAN and JUSTICE POWELL join, dissenting.

Petitioners challenge their convictions on the ground that they were obtained in violation of the *Ex Post Facto* Clause of the United States Constitution, Art. I, § 10.

Prior to September 1, 1980, Kentucky law provided that a "conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense." Ky. Rule Crim. Proc. 9.62. Effective that date, the rule was repealed, and thereafter convictions in Kentucky could legally be based upon the uncorroborated testimony of accomplices.

After repeal of the rule, petitioners in these two unrelated cases were tried for crimes that had been committed prior to the repeal. In each case, the trial court rejected the defendant's request for an instruction to the effect that the jury could not convict on the uncorroborated testimony of an accomplice. The Kentucky Supreme Court affirmed both convictions over the claim that application of the new rule violated the *Ex Post Facto* Clause. *Murphy* v. *Commonwealth*, 652 S. W. 2d 69 (1983); *Phillips* v. *Commonwealth*, 655 S. W. 2d 6 (1983).

The Supreme Court of Kentucky held that the change was not *ex post facto*, because it was merely a change in procedure. The change did not decrease the amount of evidence necessary to convict, but merely removed an impediment to the credibility of certain witnesses. *Murphy* v. *Commonwealth*, *supra*, at 72. In reaching its conclusion, the Kentucky court relied upon this Court's decision in *Hopt* v. *Utah*, 110 U. S. 574 (1884), which upheld retroactive application of a statute eliminating the ineligibility of convicted felons as witnesses. The Court in *Hopt* stated:

> "Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offence was committed, might, in respect of that offence, be obnoxious to the constitu-

> tional inhibition upon *ex post facto* laws. But alterations which do not increase the punishment, nor change the ingredients of the offence or the ultimate facts necessary to establish guilt, but—leaving untouched the nature of the crime and the amount or degree of proof essential to conviction—only remove existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the State, upon grounds of public policy, may regulate at pleasure." *Id.*, at 590.

See also *Beazell* v. *Ohio*, 269 U. S. 167 (1925); *Thompson* v. *Missouri*, 171 U. S. 380 (1898).

The Kentucky court found *Hopt* to be dispositive, stating that "[t]he rule change was simply a procedure change which made a certain class of witnesses competent without corroboration." 652 S. W. 2d, at 73.

Other courts, however, have come to precisely the opposite conclusion. For example, the United States Court of Appeals for the Third Circuit, distinguishing *Hopt*, has held that repeal of a statute requiring corroboration of accomplice testimony "reduces the amount of proof necessary for conviction" and therefore cannot constitutionally be applied retroactively. *Government of Virgin Islands* v. *Civil*, 591 F. 2d 255, 259 (1979). See also *Bowyer* v. *United States*, 422 A. 2d 973 (D. C. 1980) (abolition of requirement of corroboration of testimony of sex-crime victims); *State* v. *Byers*, 102 Idaho 159, 627 P. 2d 788 (1981) (same). Indeed, in *Commonwealth* v. *Brown*, 619 S. W. 2d 699 (1981), which was overruled by *Murphy* v. *Commonwealth*, *supra*, the Kentucky Supreme Court itself reached a result contrary to the one it reached in these two cases.

Because of the evident confusion among lower courts concerning the application of the *Ex Post Facto* Clause to changes in rules of evidence and procedure—and because some 15 other States have accomplice-corroboration requirements that they may choose to abolish, see App. to Pet. for Cert. in No. 83–5352, p. 15—we disregard our duty when certiorari is denied. Respectfully, I dissent.

No. 83–5799. RUSSELL *v.* TEXAS. Ct. Crim. App. Tex.;
No. 83–5943. GILBERT *v.* NEW MEXICO. Sup. Ct. N. M.;
No. 83–6016. WILLIAMS *v.* TENNESSEE. Sup. Ct. Tenn.;

No. 83-6020. SMITH *v.* ARIZONA. Sup. Ct. Ariz.;

No. 83-6043. ENGLE *v.* FLORIDA. Sup. Ct. Fla.; and

No. 83-6148. TEFFETELLER *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 83-5799, 655 S. W. 2d 711; No. 83-5943, 100 N. M. 392, 671 P. 2d 640; No. 83-6016, 657 S. W. 2d 405; No. 83-6020, 138 Ariz. 79, 673 P. 2d 17; No. 83-6043, 438 So. 2d 803; No. 83-6148, 439 So. 2d 840.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 81-2159. SILKWOOD, ADMINISTRATOR OF THE ESTATE OF SILKWOOD *v.* KERR-MCGEE CORP. ET AL., 464 U. S. 238;

No. 83-382. RUSH *v.* UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT ET AL., 464 U. S. 1052;

No. 83-551. BRATTON ET AL. *v.* CITY OF DETROIT ET AL., 464 U. S. 1040;

No. 83-621. CONSTANT *v.* UNITED STATES, 464 U. S. 1041;

No. 83-5341. GREENE *v.* MASSEY, SUPERINTENDENT, UNION CORRECTIONAL INSTITUTE, 464 U. S. 1046;

No. 83-5387. MITCHELL *v.* TEXAS, 464 U. S. 1073;

No. 83-5400. SELLNER *v.* HUDNALL ET AL., 464 U. S. 1046;

No. 83-5664. SIKORSKI *v.* DEN NORSKE AMERIKALINJE ET AL., 464 U. S. 1048;

No. 83-5701. ADAMS *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, 464 U. S. 1063;

No. 83-5737. COOPER *v.* FLORIDA, 464 U. S. 1073; and

No. 83-5771. ROYSE *v.* CORHART REFRACTORIES CO., 464 U. S. 1072. Petitions for rehearing denied.

Assignment Order

An order of THE CHIEF JUSTICE designating and assigning Justice Stewart (retired) to perform judicial duties in the United States Court of Appeals for the Sixth Circuit beginning October 1, 1984, and ending October 5, 1984, and for such further time as may be required to complete unfinished business, pursuant to 28

U. S. C. § 294(a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

FEBRUARY 28, 1984

Miscellaneous Order

No. A–686. **TAYLOR *v.* MAGGIO, WARDEN, ET AL.** Application for certificate of probable cause and stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. JUSTICE BRENNAN and JUSTICE STEVENS would grant the application. JUSTICE MARSHALL took no part in the consideration or decision of this application.

MARCH 5, 1984*

Appeals Dismissed

No. 83–1041. **TAYLOR ET AL. *v.* NORTH CAROLINA.** Appeal from Ct. App. N. C. dismissed for want of substantial federal question. Reported below: 60 N. C. App. 673, 300 S. E. 2d 42.

No. 83–1055. **HAHN *v.* BRYANT-POFF, INC.** Appeal from Ct. App. Ind. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 454 N. E. 2d 1223.

Certiorari Granted—Vacated and Remanded

No. 81–2340. **FAIRMAN, WARDEN *v.* WHITE.** C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Solem* v. *Stumes*, *ante*, p. 638. Reported below: 687 F. 2d 885.

Certiorari Dismissed

No. 83–5825. **DALY *v.* UNITED STATES.** C. A. 9th Cir. Certiorari dismissed. *Molinaro* v. *New Jersey*, 396 U. S. 365 (1970). Reported below: 716 F. 2d 1499.

Miscellaneous Orders

No. A–653. **EDMISTEN, ATTORNEY GENERAL OF NORTH CAROLINA, ET AL. *v.* GINGLES ET AL.** Application to stay the mandate of the United States District Court for the Eastern District of North Carolina pending appeal, addressed to JUSTICE POWELL and referred to the Court, denied.

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*JUSTICE MARSHALL took no part in the consideration or decision of the orders announced on this date.

No. A–668 (83–1386). LEGGETT, COLLECTOR OF REVENUE OF THE CITY OF ST. LOUIS, ET AL. *v.* LIDDELL ET AL. C. A. 8th Cir. Application for stay, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. D–370. IN RE DISBARMENT OF GOLDFARB. Disbarment entered. [For earlier order herein, see 464 U. S. 911.]

No. D–377. IN RE DISBARMENT OF MANDEL. Disbarment entered. [For earlier order herein, see 464 U. S. 926.]

No. D–383. IN RE DISBARMENT OF LOWENTHAL. Disbarment entered. [For earlier order herein, see 464 U. S. 988.]

No. D–384. IN RE DISBARMENT OF BIZAR. Disbarment entered. [For earlier order herein, see 464 U. S. 958.]

No. D–389. IN RE DISBARMENT OF COHEN. Disbarment entered. [For earlier order herein, see 464 U. S. 1014.]

No. D–408. IN RE DISBARMENT OF LEVENSTEIN. It is ordered that Leonard L. Levenstein, of Coral Gables, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 82–315. OREGON *v.* ROBERTI. Sup. Ct. Ore. Motion of petitioner to expedite consideration of the petition for writ of certiorari denied.

No. 83–305. CALIFORNIA *v.* TROMBETTA ET AL. Ct. App. Cal., 1st App. Dist. [Certiorari granted, 464 U. S. 1037.] Motions of National District Attorneys Association, Inc., et al. and Appellate Committee of the California District Attorneys Association for leave to file briefs as *amici curiae* granted.

No. 83–490. DAVIS ET AL. *v.* SCHERER. C. A. 11th Cir. [Probable jurisdiction noted, 464 U. S. 1017.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 83–498. BROWN, DIRECTOR, DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION OF GAMING ENFORCEMENT, STATE OF

NEW JERSEY, ET AL. *v.* HOTEL & RESTAURANT EMPLOYEES & BARTENDERS INTERNATIONAL UNION LOCAL 54 ET AL.; and

No. 83–573. DANZIGER, ACTING CHAIRMAN, CASINO CONTROL COMMISSION OF NEW JERSEY, ET AL. *v.* HOTEL & RESTAURANT EMPLOYEES & BARTENDERS INTERNATIONAL UNION LOCAL 54 ET AL. C. A. 3d Cir. [Probable jurisdiction noted, 464 U. S. 990.] Motion of International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America for leave to file a brief as *amicus curiae* granted.

No. 83–724. ROBERTS, COMMISSIONER, MINNESOTA DEPARTMENT OF HUMAN RIGHTS, ET AL. *v.* UNITED STATES JAYCEES. C. A. 8th Cir. [Probable jurisdiction noted *sub nom. Gomez-Bethke* v. *United States Jaycees,* 464 U. S. 1037.] Motion of Community Business Leaders for leave to file a brief as *amicus curiae* granted.

No. 83–1334. WINSTON, SHERIFF, ET AL. *v.* LEE. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted.

No. 83–5596. SPAZIANO *v.* FLORIDA. Sup. Ct. Fla. [Certiorari granted, 464 U. S. 1038.] Motion of Richard W. Ervin et al. for leave to file a brief as *amici curiae* granted.

No. 83–6032. TEDDER *v.* HANNERS ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until March 26, 1984, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.,* 464 U. S. 928 (1983), I would deny the petition for certiorari in this case without reaching the merits of the motion to proceed *in forma pauperis.*

No. 83–6138. FLASMAN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until March 26, 1984, within which to pay the docketing fee required by Rule 45(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN and JUSTICE STEVENS, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for certiorari in this case without reaching the merits of the motion to proceed *in forma pauperis*.

No. 83-1269. IN RE FERNANDEZ ET AL. Petition for writ of mandamus denied.

Certiorari Granted

No. 83-773. OREGON *v.* ELSTAD. Ct. App. Ore. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 61 Ore. App. 673, 658 P. 2d 552.

No. 83-1020. OHIO *v.* KOVACS, DBA B & W ENTERPRISES ET AL. C. A. 6th Cir. Certiorari granted. Reported below: 717 F. 2d 984.

No. 83-1075. CENTRAL INTELLIGENCE AGENCY ET AL. *v.* SIMS ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 228 U. S. App. D. C. 269, 709 F. 2d 95.

No. 83-1132. PARK 'N FLY, INC. *v.* DOLLAR PARK AND FLY, INC. C. A. 9th Cir. Certiorari granted. Reported below: 718 F. 2d 327.

No. 83-1158. ESTATE OF THORNTON ET AL. *v.* CALDOR, INC. Sup. Ct. Conn. Motion of Council of State Governments et al. for leave to file a brief as *amici curiae* granted. Certiorari granted. Reported below: 191 Conn. 336, 464 A. 2d 785.

Certiorari Denied. (See also No. 83-1055, *supra.*)

No. 83-373. SCOTT *v.* ROSENBERG ET AL.; and
No. 83-570. SCOTT *v.* ROSENBERG ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 702 F. 2d 1263.

No. 83-628. MOLLICA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 712 F. 2d 826.

No. 83-851. SOUTH STREET SEAPORT MUSEUM, AS OWNER OF THE BARK PEKING *v.* MCCARTHY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 716 F. 2d 130.

No. 83-890. SPIELVOGEL *v.* UNITED STATES; and
No. 83-894. LEVY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 715 F. 2d 843.

No. 83–897. STONEHILL ET AL. *v.* UNITED STATES;
No. 83–908. STONEHILL *v.* UNITED STATES; and
No. 83–909. BROOKS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 702 F. 2d 1288.

No. 83–898. TURBERVILLE *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 434 So. 2d 877.

No. 83–903. BRIGUGLIO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 720 F. 2d 668.

No. 83–1022. EARULLO ET AL. *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 113 Ill. App. 3d 774, 447 N. E. 2d 925.

No. 83–1073. MAIDSVILLE COAL CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. Reported below: 718 F. 2d 658.

No. 83–1127. SEARS, ROEBUCK & CO. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 719 F. 2d 1386.

No. 83–1135. D'ELIA *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Riverside. Certiorari denied.

No. 83–1136. ROBINETT *v.* SCHWERMAN TRUCKING CO., INC. C. A. 5th Cir. Certiorari denied. Reported below: 716 F. 2d 900.

No. 83–1139. MOORE *v.* BUFFALO BOARD OF EDUCATION. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1441.

No. 83–1142. COSMAR COMPANIA NAVIERA, S. A., ET AL. *v.* SYMEONIDES. Ct. App. La., 1st Cir. Certiorari denied. Reported below: 433 So. 2d 281.

No. 83–1150. WEHRINGER *v.* GARDNER. Sup. Ct. N. H. Certiorari denied.

No. 83–1152. BELL *v.* CITY OF LOUISVILLE. Ct. App. Ky. Certiorari denied.

No. 83–1154. MOUNT AIRY LODGE, INC. *v.* UPJOHN CO. C. A. 3d Cir. Certiorari denied. Reported below: 722 F. 2d 733.

No. 83–1157. BULLETT, ADMINISTRATOR OF THE ESTATE OF BULLETT, ET AL. *v.* UNITED TECHNOLOGIES CORPORATION

REPRESENTED EMPLOYEE RETIREMENT PLAN. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1436.

No. 83-1159. KUNTZ *v.* WINTERS NATIONAL BANK & TRUST CO. ET AL. Ct. App. Ohio, Montgomery County. Certiorari denied.

No. 83-1161. MAYLIE *v.* NATIONAL RAILROAD PASSENGER CORPORATION, AKA AMTRAK. C. A. 3d Cir. Certiorari denied. Reported below: 722 F. 2d 733.

No. 83-1163. BOLAR PHARMACEUTICAL CO., INC. *v.* CIBA-GEIGY CORP. C. A. 3d Cir. Certiorari denied. Reported below: 719 F. 2d 56.

No. 83-1210. PUGIOTI *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 96 App. Div. 2d 1152, 467 N. Y. S. 2d 106.

No. 83-1215. SOUTH CAROLINA ET AL. *v.* BLOCK, SECRETARY OF AGRICULTURE, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 717 F. 2d 874.

No. 83-1276. WEBB *v.* LANDON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 720 F. 2d 375.

No. 83-1277. STEGE, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF STEGE *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 723 F. 2d 66.

No. 83-1288. CRIM *v.* HUNTER, UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF CALIFORNIA. C. A. 2d Cir. Certiorari denied. Reported below: 714 F. 2d 112.

No. 83-1300. NORI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1443.

No. 83-1317. BIALY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 725 F. 2d 666.

No. 83-5154. WOOD *v.* SANTA BARBARA CHAMBER OF COMMERCE, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 699 F. 2d 484.

No. 83-5156. WOOD *v.* XEROX CORP. C. A. 9th Cir. Certiorari denied.

No. 83-5310. WOOD *v.* SANTA BARBARA CHAMBER OF COMMERCE, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 705 F. 2d 1515.

No. 83-5773. LANE *v.* MARSHALL, SUPERINTENDENT, SOUTHERN OHIO CORRECTIONAL FACILITY. C. A. 6th Cir. Certiorari denied. Reported below: 714 F. 2d 140.

No. 83-5796. CROWE *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied.

No. 83-5824. CONNELLY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 722 F. 2d 735.

No. 83-5843. WILKINS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 713 F. 2d 633.

No. 83-5857. SOSA *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 717 F. 2d 1400.

No. 83-5867. CARSTEA ET AL. *v.* POPLAR TREE HOMEOWNERS ASSN. Sup. Ct. Va. Certiorari denied.

No. 83-5868. CARSTEA *v.* POPLAR TREE HOMEOWNERS ASSN. Sup. Ct. Va. Certiorari denied.

No. 83-5880. BROWN *v.* ROSE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 711 F. 2d 1055.

No. 83-5882. ANDREE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 715 F. 2d 578.

No. 83-5886. GOINS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 719 F. 2d 405.

No. 83-5888. PRINCIPATO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 717 F. 2d 1313.

No. 83-6036. MARTIN *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 674 P. 2d 37.

No. 83-6037. WEBB *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 453 N. E. 2d 180.

No. 83-6044. HALL *v.* OHIO. C. A. 6th Cir. Certiorari denied. Reported below: 723 F. 2d 909.

No. 83-6045. ENGLISH *v.* MCKASKLE, ACTING DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied.

No. 83-6050. MORRIS *v.* HENDERSON ET AL. C. A. 5th Cir. Certiorari denied.

No. 83-6051. MUSZYNSKI *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 720 F. 2d 1292.

No. 83-6054. MERRILL *v.* WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 719 F. 2d 405.

No. 83-6059. FEARS *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: 659 S. W. 2d 370.

No. 83-6079. NORRIS *v.* REDMAN, WARDEN, ET AL. C. A. 3d Cir. Certiorari denied.

No. 83-6083. LEWIS *v.* SCULLY, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied.

No. 83-6085. JONES *v.* SCULLY, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1438.

No. 83-6091. FOX *v.* DIXON. C. A. 11th Cir. Certiorari denied.

No. 83-6098. LEONARDI *v.* STA-RITE REINFORCING, INC., ET AL. Sup. Ct. Mich. Certiorari denied. Reported below: 417 Mich. 1100.18.

No. 83-6100. EUGE *v.* GOLDEN ET AL. Sup. Ct. Mo. Certiorari denied.

No. 83-6114. FISHER *v.* FAUVER, DIRECTOR OF THE DIVISION OF CORRECTION AND PAROLE, ET AL. C. A. 3d Cir. Certiorari denied.

No. 83-6117. BOWRING *v.* BARBER, SHERIFF, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 723 F. 2d 900.

No. 83-6122. KHABIRI *v.* WALLACE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 718 F. 2d 1091.

No. 83-6123. Malik *v.* California. Sup. Ct. Cal. Certiorari denied.

No. 83-6143. Davis *v.* Alabama. Ct. Crim. App. Ala. Certiorari denied. Reported below: 440 So. 2d 1191.

No. 83-6157. Canda *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 725 F. 2d 685.

No. 83-6170. Grimes *v.* Heckler, Secretary of Health and Human Services. C. A. 5th Cir. Certiorari denied. Reported below: 720 F. 2d 1289.

No. 83-6176. Scott *v.* St. Paul Postal Service. C. A. 8th Cir. Certiorari denied. Reported below: 720 F. 2d 524.

No. 83-6192. Birch *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 725 F. 2d 666.

No. 83-6194. Kramer *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1445.

No. 83-6198. Perez-Paez *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 723 F. 2d 918.

No. 83-6204. Ward *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 718 F. 2d 1095.

No. 83-6205. Underwood *v.* Rees, Superintendent, Kentucky State Reformatory, et al. C. A. 6th Cir. Certiorari denied. Reported below: 723 F. 2d 911.

No. 83-6217. Bevans *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 719 F. 2d 405.

No. 83-6220. Darnell *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 716 F. 2d 479.

No. 83-6221. DeVincent *v.* United States. C. A. 1st Cir. Certiorari denied.

No. 83-6223. Helton *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1432.

No. 83-6225. Wood *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 723 F. 2d 904.

No. 83-949. STEPNEY *v.* CONNECTICUT. Sup. Ct. Conn. Motion of respondent for damages denied. Certiorari denied. Reported below: 191 Conn. 233, 464 A. 2d 758.

No. 83-1140. ARIZONA ET AL. *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition.†

No. 83-5767. LEATHERWOOD *v.* MISSISSIPPI. Sup. Ct. Miss.;
No. 83-6084. MOORE *v.* BALKCOM, WARDEN, ET AL. C. A. 11th Cir.; and
No. 83-6150. TAFERO *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 83-5767, 435 So. 2d 645; No. 83-6084, 716 F. 2d 1511 and 722 F. 2d 629; No. 83-6150, 440 So. 2d 350.

JUSTICE BRENNAN, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 82-357. MICHIGAN *v.* CLIFFORD ET AL., 464 U. S. 287;
No. 83-638. ALCAN ALUMINUM LTD. *v.* FRANCHISE TAX BOARD OF CALIFORNIA ET AL., 464 U. S. 1041;
No. 83-5581. GLOVER ET AL. *v.* ALEXANDER, SECRETARY OF THE ARMY, 464 U. S. 1071;
No. 83-5696. CAULTON *v.* HOSPITAL OF THE GOOD SAMARITAN ET AL., *ante*, p. 1009;
No. 83-5724. BALTSAVIAS *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, 464 U. S. 1050;
No. 83-5734. MARTEL ET AL. *v.* NEW HAMPSHIRE ET AL., 464 U. S. 1050; and
No. 83-5862. MANKO *v.* UNITED STATES, *ante*, p. 1010. Petitions for rehearing denied.

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†See also note, *supra*, p. 1075.

MARCH 8, 1984

Dismissal Under Rule 53

No. 83-1213. BUTCHER *v.* UNITED STATES. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 721 F. 2d 294.

MARCH 12, 1984

Dismissal Under Rule 53

No. 83-305. CALIFORNIA *v.* TROMBETTA ET AL. Ct. App. Cal., 1st App. Dist. [Certiorari granted, 464 U. S. 1037.] Writ of certiorari dismissed as to respondents Thomas Nelson Muldoon and James K. Schneider under this Court's Rule 53.

MARCH 13, 1984

Certiorari Denied

No. 83-5720. AUTRY *v.* MCKASKLE, ACTING DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 706 F. 2d 1394.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

It is not unusual for this Court to spend considerable amounts of time deliberating over difficult issues presented in a petition for a writ of certiorari. Yet in this case, where the constitutional validity of a death sentence is challenged on a variety of substantial grounds, the Court is dramatically expediting its normal deliberative processes to clear the way for an impending execution.

Unfortunately, this case is not an aberration but is part of a pattern of recent decisions in each of which the Court has shown an unseemly desire to bring litigation in a capital case to a fast and irrevocable end. See, *e. g.*, *Woodard* v. *Hutchins*, 464 U. S. 377, 383 (1984) (BRENNAN, J., dissenting) (criticizing "rush to judgment" in decision to vacate stay of execution); *ibid.* (WHITE and STEVENS, JJ., dissenting); *id.*, at 383-384 (MARSHALL, J., dissenting); *Autry* v. *Estelle*, 464 U. S. 1, 5-6 (1983) (STEVENS, J., dissenting) (criticizing decision to deny stay of execution pending filing and disposition of petition for certiorari); *Barefoot* v. *Estelle*, 463 U. S. 880, 914-916 (1983) (MARSHALL, J., dissenting) (criticizing suggestion that courts of appeals may adopt special, summary procedures for cases in which a stay of a death sentence has been requested).

Among the materials presently before the Court pertaining to petitioner's conviction and sentence are an application for a certificate of probable cause, two petitions for certiorari, and an application for a stay pending disposition of the latest petition for certiorari. See *Autry* v. *McKaskle*, *post*, p. 1090. Despite the fact that the petition in No. 83–5720 was still pending in this Court, the State set the date for petitioner's execution during our recess. Aware that the State cannot execute petitioner while his various petitions are pending in this Court, cf. *United States* v. *Shipp*, 203 U. S. 563 (1906), and yet unwilling to postpone petitioner's scheduled execution even a day or so, the Court has cut short its consideration of petitioner's multifarious claims. I, for one, feel unfairly pressed by the Court's insistence upon expedited procedures in death cases.[1]

As an indication of the serious nature of the questions petitioner poses, I shall briefly discuss two issues raised in one of his petitions for certiorari, No. 83–5720, that clearly merit plenary review. I fear that, in our rush to judgment, we could be overlooking still other important claims.

The first issue posed in No. 83–5720—whether the State wrongfully denied immunity to a witness necessary to petitioner's defense—implicates a conflict among the Federal Courts of Appeals regarding the proper standards for testing such claims. The second issue involves substantial allegations that petitioner was convicted on the basis, at least in part, of statements made as a result of beatings administered by police—allegations that have never been adequately addressed by the courts below.

Petitioner, James David Autry, was convicted and sentenced to death for murdering a clerk while attempting to rob a convenience store.[2] For the purpose of evaluating his petition for certiorari, two sets of circumstances are significant. First, petitioner unsuccessfully requested the trial court to grant his codefendant, John Alton Sandifer, use immunity for his eyewitness testimony regarding the events that transpired at the scene of the crime. According to petitioner, Sandifer's testimony would confirm petitioner's story that neither a robbery nor an attempted robbery occurred at the store. If not committed in the course of a robbery or attempted robbery, the murder would not constitute a *capital* crime. Although the prosecution granted immunity to three of Sandifer's relatives, it did not grant immunity to Sandifer himself. As a result, he refused to testify on petitioner's behalf for fear that the State would subsequently use his testimony against him. Second, Autry alleges that, after he was arrested, he was subjected to physical abuse by police and that, as a result of these beatings, he made a written confession and later repeated certain portions of his confession during a telephone call to his mother that was made within earshot of police officers. The written confession was later suppressed. However, the trial court admitted into evidence the testimony of an officer who overheard petitioner's conversation with his mother.

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[1] In this case, for example, the Court voted to deny all of petitioner's requests for relief while this opinion was still being prepared.

[2] One way to trigger the Texas death penalty statute is intentionally to commit murder in the course of committing or attempting to commit robbery. Tex. Penal Code Ann. § 19.03(a)(2) (1974).

I

Petitioner contends that the trial court committed constitutional error when it refused to grant use immunity to Sandifer. In support of this claim, petitioner cites decisions by the Third Circuit recognizing that, under certain conditions, a defendant has a right, under the Due Process Clause, to a judicially administered grant of immunity to a witness whose testimony is essential to an effective defense. See *Government of Virgin Islands* v. *Smith*, 615 F. 2d 964 (1980); *United States* v. *Herman*, 589 F. 2d 1191 (1978); *United States* v. *Morrison*, 535 F. 2d 223 (1976). Here, petitioner claims that Sandifer's testimony was essential to an effective defense because it would show that the elements that elevated his crime to a capital offense—robbery or attempted robbery in the course of an intentional homicide—were simply not present in the conduct for which petitioner has been sentenced to death. The Court of Appeals for the Fifth Circuit justified its denial of petitioner's request for habeas corpus relief in part on the basis of its disagreement with the line of cases decided by the Third Circuit. According to the Fifth Circuit, a trial court is not required to grant immunity to a defense witness simply because that witness has essential exculpatory information unavailable from other sources. *Autry* v. *Estelle*, 706 F. 2d 1394, 1400–1403 (1983); *United States* v. *Thevis*, 665 F. 2d 616, 638-641 (1982). Certiorari should be granted to resolve this conflict,[3] especially inasmuch as it arises in a case in which a death sentence has been imposed.

The Court of Appeals also suggested that, in this case, "differences among the circuits are . . . a strawman because Autry fails all their tests." *Autry* v. *Estelle*, *supra*, at 1401. Its contention that Autry would be ineligible for relief even under the Third Circuit's less restrictive standard was based upon the Fifth Circuit's view of the likely nature of Sandifer's testimony were he to be granted use immunity. The District Court and the Court of Appeals both found that Sandifer's testimony was unlikely to be exculpatory. Their conclusion stemmed from their evaluation of a confession that Sandifer gave to the police soon after his arrest. Petitioner claimed that Sandifer's confession tended to exculpate petitioner because it made no mention of a robbery, thus supporting other evidence tending to show that no robbery of the convenience store was either intended or accomplished. The Court of Appeals rejected petitioner's claim because it found that Sandifer's confession inculpated petitioner inasmuch as Sandifer named petitioner as the triggerman in the shootings. Indeed, the Court of Appeals concluded that the State's case would actually have benefited from Sandifer's testimony. The Court of Appeals' finding on this issue derives from a misunderstanding of petitioner's argument. Petitioner does not claim that Sandifer's testimony would exonerate him of wrongdoing; he claims merely that that testimony would show that no robbery attended the shootings at the convenience store. Sandifer's testimony might have enhanced the State's ability to show that petitioner had committed murder, but would have materially weakened the State's contention that petitioner committed *capital* murder within the meaning of the pertinent Texas statute.

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[3] As the Fifth Circuit has noted:

"The Supreme Court has not decided whether courts may grant defense witnesses use immunity, and the circuit courts which have addressed the issue have produced widely divergent opinions. On the question whether judicial use immunity is necessary for essential exculpatory testimony, the courts have split three ways. The Third Circuit . . . held that such immunity is available in certain circumstances. On the other hand, the Seventh, Eighth and District of Columbia Circuits have ruled that such immunity is unavailable. . . . The remaining circuits which have addressed the issue have denied immunity in the specific cases before them, but left open whether immunity would ever be available." *United States* v. *Thevis*, 665 F. 2d, at 639 (footnote omitted).

Although the Fifth Circuit has never explicitly determined whether due process may require a trial court to grant a defendant use immunity, its decisions imply that courts lack such power under any circumstances. *Id.*, at 639, n. 25.

II

The second issue presented in the petition involves the admissibility of testimony by a police officer regarding statements that the officer heard petitioner make to his mother during a telephone conversation. Prior to the conversation, petitioner had given the police a written confession that was subsequently suppressed by the trial judge. Petitioner claimed that the confession was the result of beatings administered by the police, a claim that was contradicted by the interrogating officers. The trial court did not resolve the issue whether the confession was the product of physical coercion. Rather, it suppressed the confession based upon a finding that the police previously had failed to honor petitioner's request that the interrogation be terminated. *Autry* v. *Estelle*, *supra*, at 1403. Petitioner claims that the incriminating statements he made during his conversation with his mother stemmed from the tainted written confession because he was afraid that he would again be punished if, during his conversation, he said anything inconsistent with the confession that had just been wrung from him. According to petitioner, one of the officers who was in the room where he made the telphone call to his mother had participated in his beating.

Substantial evidence indicates that petitioner was subjected to physical abuse. Petitioner's testimony that he was beaten was confirmed by John R. Sandifer, the father of petitioner's codefendant and an immunized prosecution witness. John Sandifer stated that when he saw petitioner in jail following petitioner's arrest and interrogation, he noticed that "[t]he left side of his face was swollen bad." Pet. for Cert. 11. Sandifer also observed that petitioner "had numerous bruises on his body. Below the belt and above the belt. . . . Looked like his ribs were broke." *Id.*, at 12. Asked whether petitioner had told him how he received these bruises, Sandifer replied: "He told me they beat him. . . . He said they beat him with a Houston telephone book. . . . He told me that they beat on him until he couldn't take no more. He said he would sign anything if they quit beating him." *Ibid.* Also available at the suppression hearing was a videotape of petitioner made by the police soon after he signed his written confessions; that tape subsequently was inexplicably lost. The trial court denied petitioner's motion to suppress the testimony based on the overheard conversation with his mother. The trial court offered no reasons, however, for its decision and made no findings concerning the alleged beatings.

In habeas corpus proceedings, the Federal District Court handled the trial court's failure to make factual findings by assuming all of petitioner's allegations to be true. Assuming that petitioner had been beaten into signing the written confession, the District Court found that his oral declarations were "voluntary and 'sufficiently an act of free will to purge the primary taint' of the physically coerced written confessions." App. B to Pet. for Cert. 11. The Court of Appeals affirmed, emphasizing the following facts: six hours, during which petitioner was allowed to sleep in his cell, elapsed between the putative beatings and petitioner's call to his mother; petitioner himself requested to make the call; and the overheard statements were directed not to any agent of the State but rather to a private party of petitioner's own choosing. *Autry* v. *Estelle*, 706 F. 2d, at 1403.

Assuming, as did the District Court and Court of Appeals, that petitioner's allegations were true, I cannot accept the lower courts' conclusion that the overheard statements were voluntary. Petitioner made these statements in a telephone conversation conducted in the booking room of the jail while in close proximity to an officer who had recently participated in beating a confession out of him. To my mind, these circumstances raise sufficient doubt regarding the voluntariness of the statements to require suppression of the policeman's account of the conversation. I find it implausible that six hours of sleep could erase from petitioner's consciousness the fear that the earlier beatings must have engendered. Nor does the fact that he initiated the call negate the possibility that he wanted to make contact with a source of outside support and at the same time to avoid a new round of beatings for contradicting his earlier coerced confession. Assuming, as we must, that petitioner was subjected to beatings, the burden was upon the State to show that the telephone conversation was untainted by continued coercion. The State failed to sustain that burden.

For these reasons, I dissent.

No. 83–6388 (A–718). AUTRY *v.* MCKASKLE, ACTING DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, denied. Application for certificate of probable cause denied. Certiorari denied. Reported below: 727 F. 2d 358.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

As I have recently explained, see *Pulley* v. *Harris*, *ante*, at 60 (BRENNAN, J., dissenting), there has been no change over the past 10 years in the manner in which capital punishment is administered in this country that has in any way shaken my conviction that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, see *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting). I would, therefore, grant the application for a stay of execution, grant certiorari, and vacate the death sentence.

Indeed, the particular circumstances of this case only serve to reinforce my conviction that the imposition of the death penalty in our society inevitably amounts to an inexcusable affront to "the dignity of man." *Trop* v. *Dulles*, 356 U. S. 86, 100 (1958). Mr. Autry has already endured the profound psychological torment of lying strapped to a gurney for over an hour with an intravenous needle in his arm, waiting to be put to death. That wait was brought to an end by the grant of a last-minute stay permitting him time to vindicate his constitutional rights. Following today's decision, however, he will again have to undergo the same indignity and psychological anguish, knowing that this time will probably be the last. Faced with such circumstances, I for one refuse to accept the notion implicit in today's decision that we have kept faith with the dual promise of the Eighth Amendment that the State's power to punish is "exercised within the limits of civilized standards," and that we keep pace with the "evolving standards of decency that mark the progress of a maturing society" in carrying out criminal punishments. *Id.*, at 100–101.

I dissent.

MARCH 14, 1984

Dismissal Under Rule 53

No. 83–1109. RIEGEL PRODUCTS CORP., INC., ET AL. *v.* MEYER. C. A. 3d Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 720 F. 2d 303.

Miscellaneous Order

No. A-725. Claiborne, United States District Judge *v.* United States. Application to stay proceedings in the United States District Court for the District of Nevada, presented to Justice White, and by him referred to the Court, denied.

March 19, 1984

Affirmed on Appeal

No. 83-640. Texas *v.* KVUE-TV, Inc., et al. Affirmed on appeal from C. A. 5th Cir. Justice Rehnquist, Justice Stevens, and Justice O'Connor would note probable jurisdiction and set case for oral argument. Reported below: 709 F. 2d 922.

Appeals Dismissed

No. 83-880. Johnson *v.* Schermerhorn et al. Appeal from Sup. Ct. Minn. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 337 N. W. 2d 692.

No. 83-1190. Athens Lumber Co., Inc., et al. *v.* Federal Election Commission et al. Appeal from C. A. 11th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 718 F. 2d 363.

No. 83-1265. DeNardo *v.* Johnstone, Judge, Alaska Judicial Council, et al. Appeal from Sup. Ct. Alaska dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 669 P. 2d 537.

No. 83-6166. Pope et al. *v.* Joliet Federal Savings & Loan Assn. Appeal from Sup. Ct. Ill. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 96 Ill. 2d 560.

No. 83-6202. Taylor *v.* United States. Appeal from C. A. 11th Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 83–911. UNITED STATES BREWERS ASSN., INC., ET AL. *v.* RODRIGUEZ, DIRECTOR OF THE NEW MEXICO DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL; and

No. 83–927. ANHEUSER-BUSCH, INC. *v.* RODRIGUEZ, DIRECTOR OF THE NEW MEXICO DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL. Appeals from Sup. Ct. N. M. dismissed for want of substantial federal question. JUSTICE POWELL took no part in the consideration or decision of these appeals. Reported below: 100 N. M. 216, 668 P. 2d 1093.

JUSTICE STEVENS, concurring.

The New Mexico Discrimination in Selling Act, enacted in 1967, N. M. Stat. Ann. §§ 60–12–1 through 60–12–10 (1978), limited the price which a producer of "alcoholic liquor" (defined to exclude malt beverages such as beer) could charge New Mexico liquor wholesalers to the lowest price it charged wholesalers in any other State during the preceding month. In 1979, the New Mexico Legislature amended the statute, commonly referred to as a price affirmation law, to extend its coverage to malt beverages. 1979 N. M. Laws, ch. 83.

The appellants, producers of malt beverages, filed this action in the New Mexico District Court of Santa Fe County for declaratory and injunctive relief challenging the validity of the 1979 amendment on state and federal constitutional grounds. Specifically, appellants argued that the amended Act constituted a burden on commerce in violation of the Commerce Clause and conflicted with federal antitrust laws in violation of the Supremacy Clause. In 1980, the District Court entered summary judgment for appellee, upholding the constitutionality of the 1979 amendment. The New Mexico Supreme Court affirmed the judgment of the District Court and remanded for further proceedings, rejecting appellants' federal constitutional claims that the amended statute was invalid on its face. *United States Brewers Assn., Inc.* v. *Director, Dept. of Alcoholic Beverage Control*, 100 N. M. 216, 668 P. 2d 1093 (1983). The court relied on this Court's decisions in *Joseph E. Seagram & Sons, Inc.* v. *Hostetter*, 384 U. S. 35 (1966), and *Rice* v. *Norman Williams Co.*, 458 U. S. 654 (1982).

In 1981, while the appeal to the New Mexico Supreme Court was pending, the New Mexico Legislature repealed the 1967 Act, as amended, and enacted a new price affirmation law. N. M.

Stat. Ann. §§ 60–8A–12 through 60–8A–15 (1981). While in most respects the 1981 Act is a recodification of the previous statute, it differs from the prior law in one respect which appellants in No. 83–911 argue is significant for purposes of constitutional analysis. The 1981 Act does not limit wholesale prices to the lowest price charged in other States *in the preceding month*, but instead employs a different time period as the reference point.

The New Mexico Supreme Court expressly noted that the 1967 Act had been repealed and replaced by the 1981 Act. 100 N. M., at 217, n. 1, 668 P. 2d, at 1094, n. 1. It did not pass on the validity of the 1981 Act, however, and limited its consideration to the 1967 Act as amended in 1979. Indeed, it does not appear that appellants ever specifically requested the court to construe the 1981 Act or to rule on its validity.

Appellants in No. 83–911 ask us to vacate the judgment below and to remand the case to the New Mexico Supreme Court "for clarification of the implications for this case of the 1981 amendments" and for further consideration in light of this Court's decision in *Healy* v. *United States Brewers Assn., Inc.*, 464 U. S. 909 (1983), summarily aff'g 692 F. 2d 275 (CA2 1982). Juris. Statement 11. Appellant in No. 83–927, on the other hand, maintains that since the New Mexico Supreme Court did not rule on the effect or validity of the 1981 statute, no question concerning the 1981 statute is involved in this appeal. Appellant in No. 83–927 also demonstrates that the question of the validity of the 1967 Act as amended in 1979 is not moot.

Our recent decision in *Healy*, invalidating a Connecticut price affirmation statute, does not undermine the New Mexico Supreme Court's reliance on *Joseph E. Seagram & Sons, Inc.* v. *Hostetter* and *Rice* v. *Norman Williams Co.* in upholding the constitutionality of the 1967 New Mexico Act as amended in 1979. Moreover, it seems quite plain that the New Mexico Supreme Court did not pass on the validity of the 1981 Act. Thus, we have no occasion to consider whatever relevance *Healy* might have to a constitutional challenge of the 1981 Act in these appeals. Nor do we have any power to order the state court to pass on a question that was apparently not properly presented to it when it entered the judgment we are now being asked to review. I therefore concur in dismissing these appeals from the judgment upholding the 1967 Act as amended in 1979 for want of a substantial federal question without reaching any issue which might exist concerning the 1981 Act.

No. 83-1086. TOP TILE BUILDING SUPPLY CORP. ET AL. *v.* NEW YORK STATE TAX COMMISSION ET AL. Appeal from Ct. App. N. Y. dismissed for want of jurisdiction. Reported below: 60 N. Y. 2d 653, 454 N. E. 2d 1315.

No. 83-1224. CONSUMER VALUE STORES *v.* BOARD OF PHARMACY OF NEW JERSEY. Appeal from Super. Ct. N. J., App. Div., dismissed for want of substantial federal question. Reported below: 191 N. J. Super. 7, 465 A. 2d 522.

No. 83-6186. ROGERS *v.* NORTH CAROLINA. Appeal from Sup. Ct. N. C. dismissed for want of substantial federal question. Reported below: 309 N. C. 633, 308 S. E. 2d 716.

No. 83-1280. AIMONE *v.* FINLEY, CLERK OF THE CIRCUIT COURT OF COOK COUNTY. Appeal from App. Ct. Ill., 1st Dist., dismissed for want of jurisdiction, it appearing the judgment below rests upon independent and adequate state grounds. Reported below: 113 Ill. App. 3d 507, 447 N. E. 2d 868.

Certiorari Granted—Vacated and Remanded

No. 82-2094. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* WEBB. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Heckler* v. *Mathews*, *ante*, p. 728. Reported below: 701 F. 2d 81.

No. 82-5812. SCANLON *v.* ATASCADERO STATE HOSPITAL ET AL. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Consolidated Rail Corporation* v. *Darrone*, *ante*, p. 624. Reported below: 677 F. 2d 1271.

No. 83-650. MEYERSON *v.* ARIZONA ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Consolidated Rail Corporation* v. *Darrone*, *ante*, p. 624. JUSTICE O'CONNOR took no part in the consideration or decision of this case. Reported below: 709 F. 2d 1235.

Miscellaneous Orders

No. — — ——. HOOPA VALLEY TRIBE OF INDIANS *v.* SHORT ET AL. Motion for leave to file petition for writ of certiorari with an appendix that does not comply with the Rules of this Court granted.

No. D-368. In re Disbarment of Glasschroeder. Disbarment entered. [For earlier order herein, see 464 U. S. 911.]

No. D-379. In re Disbarment of Grossman. Disbarment entered. [For earlier order herein, see 464 U. S. 926.]

No. D-381. In re Disbarment of Cairo. Disbarment entered. [For earlier order herein, see 464 U. S. 958.]

No. D-394. In re Disbarment of Schlesinger. Disbarment entered. [For earlier order herein, see 464 U. S. 1066.]

No. D-409. In re Disbarment of Maier. It is ordered that William C. Maier, of Hobbs, N. M., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-410. In re Disbarment of Pacor. It is ordered that Victor N. Pacor, of the Bronx, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-411. In re Disbarment of Sheehy. It is ordered that Donald Joseph Sheehy, of Annapolis, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-412. In re Disbarment of Spitznagel. It is ordered that Carl S. Spitznagel, Jr., of Tampa, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-413. In re Disbarment of Goldstein. It is ordered that Charles H. Goldstein, of West Islip, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D-414. In re Disbarment of Block. It is ordered that Malcolm L. Block, of Cherry Hill, N. J., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 98, Orig. PENNSYLVANIA *v.* OKLAHOMA. Motion for leave to file bill of complaint denied.

No. 83-18. DUN & BRADSTREET, INC. *v.* GREENMOSS BUILDERS, INC. Sup. Ct. Vt. [Certiorari granted, 464 U. S. 959.] Motion of respondent for leave to file supplemental brief denied.

No. 83-141. HAWAII HOUSING AUTHORITY ET AL. *v.* MIDKIFF ET AL.;
No. 83-236. PORTLOCK COMMUNITY ASSN. (MAUNALUA BEACH) ET AL. *v.* MIDKIFF ET AL.; and
No. 83-283. KAHALA COMMUNITY ASSN., INC., ET AL. *v.* MIDKIFF ET AL. C. A. 9th Cir. [Probable jurisdiction noted, 464 U. S. 932.] Motion of appellants in No. 83-236 for divided argument denied. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 83-305. CALIFORNIA *v.* TROMBETTA ET AL. Ct. App. Cal., 1st App. Dist. [Certiorari granted, 464 U. S. 1037.] Motion of respondents for divided argument denied.

No. 83-751. SECURITIES AND EXCHANGE COMMISSION ET AL. *v.* JERRY T. O'BRIEN, INC., ET AL. C. A. 9th Cir. [Certiorari granted, 464 U. S. 1038.] Motion of North American Securities Administrators Association, Inc., for leave to file a brief as *amicus curiae* granted.

No. 83-812. WALLACE, GOVERNOR OF ALABAMA, ET AL. *v.* JAFFREE ET AL. Appeal from C. A. 11th Cir. Motion of American Civil Liberties Union et al. for leave to file a brief as *amici curiae* granted.

No. 83-916. UNITED STATES *v.* MORTON. C. A. Fed. Cir. [Certiorari granted, *ante*, p. 1004.] Motion of the Solicitor General to permit Michael W. McConnell, Esquire, to present oral argument *pro hac vice* granted.

No. 83-967. TERRITORY OF GUAM *v.* OKADA. C. A. 9th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 83-997. TRANS WORLD AIRLINES, INC. *v.* THURSTON ET AL. C. A. 2d Cir. [Certiorari granted, *ante*, p. 1065.] Motion of the parties to dispense with printing the joint appendix granted.

No. 83–1158. ESTATE OF THORNTON ET AL. *v.* CALDOR, INC. Sup. Ct. Conn. [Certiorari granted, *ante,* p. 1078.] Motion of Connecticut for leave to intervene as a party petitioner granted.

No. 83–1246. PEICK ET AL. *v.* PENSION BENEFIT GUARANTY CORPORATION. C. A. 7th Cir. Motion of American Trucking Associations, Inc., for leave to file a brief as *amicus curiae* granted.

No. 83–1279. FLORIDA *v.* MEYERS, AKA WEYERS. Dist. Ct. App. Fla., 4th Dist. Motion of respondent for leave to proceed *in forma pauperis* granted.

No. 83–5778. ORDWAY *v.* REGION 13 MENTAL HEALTH-MENTAL RETARDATION COMMISSION, DBA GULF COAST MENTAL HEALTH CENTER, ET AL., 464 U. S. 1067. Motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* denied.

Probable Jurisdiction Noted

No. 83–1035. TENNESSEE *v.* GARNER ET AL.; and

No. 83–1070. MEMPHIS POLICE DEPARTMENT ET AL. *v.* GARNER ET AL. C. A. 6th Cir. Motion of Cleamtee Garner for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted in No. 83–1035. Certiorari granted in No. 83–1070. Cases consolidated and a total of one hour allotted for oral argument. Reported below: 710 F. 2d 240.

Certiorari Granted. (See also No. 83–1070, *supra.*)

No. 83–728. HERB'S WELDING, INC., ET AL. *v.* GRAY ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 703 F. 2d 176 and 711 F. 2d 666.

No. 83–859. CALIFORNIA *v.* CARNEY. Sup. Ct. Cal. Certiorari granted. Reported below: 34 Cal. 3d 597, 668 P. 2d 807.

No. 83–1170. UNITED STATES *v.* 50 ACRES OF LAND ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 706 F. 2d 1356.

No. 83–935. UNITED STATES *v.* ABEL. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 707 F. 2d 1013.

No. 83-1065. COUNTY OF ONEIDA, NEW YORK, ET AL. *v.* ONEIDA INDIAN NATION OF NEW YORK STATE ET AL.; and

No. 83-1240. NEW YORK *v.* ONEIDA INDIAN NATION OF NEW YORK STATE ET AL. C. A. 2d Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. The Solicitor General is invited to file a brief in these cases expressing the views of the United States. Reported below: 719 F. 2d 525.

No. 83-5424. AKE *v.* OKLAHOMA. Ct. Crim. App. Okla. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 663 P. 2d 1.

Certiorari Denied. (See also Nos. 83-880, 83-1190, 83-1265, 83-6166, and 83-6202, *supra.*)

No. 82-1159. METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY *v.* JONES. C. A. 11th Cir. Certiorari denied. Reported below: 681 F. 2d 1376.

No. 82-5857. APONTE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 689 F. 2d 10.

No. 83-227. SCHLANSKY *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 709 F. 2d 1079.

No. 83-779. LAGLIA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 707 F. 2d 1209.

No. 83-795. INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA ET AL. *v.* DONOVAN, SECRETARY OF LABOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 714 F. 2d 887.

No. 83-807. SIEBERT *v.* BAPTIST, DISTRICT DIRECTOR OF INTERNAL REVENUE SERVICE, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 707 F. 2d 522.

No. 83-848. MARTINEZ ET AL. *v.* SMITH, ATTORNEY GENERAL, ET AL. C. A. 5th Cir. Certiorari denied.

No. 83-857. TOWN OF ORANGETOWN *v.* RUCKELSHAUS, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL AGENCY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 718 F. 2d 29.

No. 83-858. BLANTON *v.* UNITED STATES; and

No. 83-860. HOOD ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 719 F. 2d 815.

No. 83-864. WHITTEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 706 F. 2d 1000.

No. 83-886. STATE BOARD OF EQUALIZATION OF GEORGIA ET AL. *v.* SOUTHERN RAILWAY CO. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 715 F. 2d 522.

No. 83-933. GRAY *v.* BELL ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 229 U. S. App. D. C. 176, 712 F. 2d 490.

No. 83-937. MONTEMAYOR DE LA PAZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 712 F. 2d 1415.

No. 83-942. RIPLEY COUNTY AREA PLAN COMMISSION *v.* ROUSE ET AL. Sup. Ct. Ind. Certiorari denied. Reported below: 448 N. E. 2d 1057.

No. 83-956. BERRYMAN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 717 F. 2d 650.

No. 83-972. RAILWAY LABOR EXECUTIVES' ASSN. *v.* OGILVIE, TRUSTEE OF THE CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD CO., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 713 F. 2d 274.

No. 83-973. AMERICAN POSTAL WORKERS UNION, AFL-CIO *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 227 U. S. App. D. C. 351, 707 F. 2d 548.

No. 83-978. SAMUEL MOORE & CO. ET AL. *v.* MULTIFLEX, INC.; and

No. 83-1141. MULTIFLEX, INC. *v.* SAMUEL MOORE & CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 709 F. 2d 980.

No. 83-986. GRAND JEWELS, INC. *v.* MONTRES ROLEX, S. A., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 718 F. 2d 524.

No. 83-994. MOLLNOW *v.* CARLTON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 716 F. 2d 627.

No. 83-1010. BROWN & WILLIAMSON TOBACCO CORP. *v.* FEDERAL TRADE COMMISSION. C. A. 6th Cir. Certiorari denied. Reported below: 710 F. 2d 1165.

No. 83-1027. Morton *v.* Hildebrandt et al. Sup. Ct. Ohio. Certiorari denied.

No. 83-1046. Gjieli *v.* United States; and

No. 83-6087. Lulgjuraj et al. *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 717 F. 2d 968.

No. 83-1085. American Cyanamid Co. *v.* Melamine Chemicals, Inc., et al. C. A. 2d Cir. Certiorari denied. Reported below: 719 F. 2d 558.

No. 83-1107. City of Dearborn et al. *v.* Amen et al. C. A. 6th Cir. Certiorari denied. Reported below: 718 F. 2d 789.

No. 83-1146. Railway Labor Executives' Assn. *v.* United States et al. Sp. Ct. R. R. R. A. Certiorari denied. Reported below: 575 F. Supp. 1554.

No. 83-1151. Spring *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: 656 S. W. 2d 910.

No. 83-1156. Wilson et al. *v.* United States et al. C. A. 8th Cir. Certiorari denied. Reported below: 707 F. 2d 304.

No. 83-1168. Air Line Pilots Assn., International, et al. *v.* Western Air Lines, Inc. C. A. 9th Cir. Certiorari denied. Reported below: 722 F. 2d 744.

No. 83-1172. Riley *v.* International Union of Allied Industrial Workers et al. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 112 Ill. App. 3d 1171, 456 N. E. 2d 378.

No. 83-1179. Stenquist *v.* Stenquist. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 145 Cal. App. 3d 430, 193 Cal. Rptr. 587.

No. 83-1181. Meldish *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 722 F. 2d 26.

No. 83-1188. Smith *v.* Pennsylvania Board of Law Examiners. Sup. Ct. Pa. Certiorari denied.

No. 83-1189. Board of Education of the Northport-East Northport Union Free School District et al. *v.* Ambach, Commissioner of Education of the State of New York, et al. Ct. App. N. Y. Certiorari denied. Reported below: 60 N. Y. 2d 758, 457 N. E. 2d 775.

No. 83–1183. New Motor Vehicle Board of California *v.* Chevrolet Motor Division, General Motors Corp.;

No. 83–1185. Northern California Motor Car Dealers Assn., Inc., et al. *v.* Chevrolet Motor Division, General Motors Corp.; and

No. 83–1195. 49er Chevrolet et al. *v.* Chevrolet Motor Division, General Motors Corp. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 146 Cal. App. 3d 533, 194 Cal. Rptr. 270.

No. 83–1192. Thompson *v.* Johns-Manville Sales Corp. et al. C. A. 5th Cir. Certiorari denied. Reported below: 714 F. 2d 581.

No. 83–1194. Cullen *v.* Cullen. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 145 Cal. App. 3d 424, 193 Cal. Rptr. 590.

No. 83–1197. Mason et al. *v.* Burger King Corp. C. A. 11th Cir. Certiorari denied. Reported below: 710 F. 2d 1480.

No. 83–1207. Riffe, Administratrix of the Estate of Riffe *v.* International Harvester Co. Ct. App. Ky. Certiorari denied.

No. 83–1211. Teamsters Local Union No. 36, Building Material & Dump Truck Drivers *v.* Edwards. C. A. 9th Cir. Certiorari denied. Reported below: 719 F. 2d 1036.

No. 83–1214. Alessi et al. *v.* Committee on Professional Standards, Third Judicial Department. Ct. App. N. Y. Certiorari denied. Reported below: 60 N. Y. 2d 229, 457 N. E. 2d 682.

No. 83–1217. Di Buono, Assignment Judge, et al. *v.* Fauver, Commissioner, New Jersey Department of Corrections; and

No. 83–1218. Union County Jail Inmates et al. *v.* Fauver, Commissioner, New Jersey Department of Corrections, et al. C. A. 3d Cir. Certiorari denied. Reported below: 713 F. 2d 984 and 718 F. 2d 1247.

No. 83–1223. Whirlpool Corp. *v.* Vance. C. A. 4th Cir. Certiorari denied. Reported below: 707 F. 2d 483 and 716 F. 2d 1010.

No. 83-1225. WYMBS ET AL. *v.* REPUBLICAN STATE EXECUTIVE COMMITTEE OF FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 719 F. 2d 1072.

No. 83-1238. MAY *v.* AMERICAN SOUTHWEST WATERBED DISTRIBUTORS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 715 F. 2d 876.

No. 83-1243. FRANKLIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 718 F. 2d 1114.

No. 83-1245. WILHELM *v.* CONTINENTAL TITLE CO. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 720 F. 2d 1173.

No. 83-1247. POWELL MANUFACTURING CO., INC. *v.* HARRINGTON MANUFACTURING CO., INC. C. A. Fed. Cir. Certiorari denied.

No. 83-1270. DAILEY ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. Reported below: 718 F. 2d 1107.

No. 83-1271. MCDONAGH *v.* MASSACHUSETTS. Ct. App. Mass. Certiorari denied. Reported below: 16 Mass. App. 1110, 454 N. E. 2d 1303.

No. 83-1295. CARON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 722 F. 2d 739.

No. 83-1313. TWIN PARKS LIMITED PARTNERSHIP *v.* N. S. C. CONTRACTORS, INC. C. A. 4th Cir. Certiorari denied. Reported below: 720 F. 2d 1374.

No. 83-1324. MARTIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 721 F. 2d 266.

No. 83-1343. LOPEZ-LLERENA ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 721 F. 2d 311.

No. 83-1366. FOSTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 711 F. 2d 871.

No. 83-1382. GERAGHTY *v.* UNITED STATES PAROLE COMMISSION ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 719 F. 2d 1199.

No. 83-5102. MAURER *v.* KARTOZIAN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 703 F. 2d 576.

No. 83-5214. VOGEL *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 501 Pa. 314, 461 A. 2d 604.

No. 83-5714. BRUTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 722 F. 2d 742.

No. 83-5780. VARDAS *v.* MCKASKLE, ACTING DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 715 F. 2d 206.

No. 83-5809. BECKETT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 722 F. 2d 735.

No. 83-5811. SHANE *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 309 N. C. 438, 306 S. E. 2d 765.

No. 83-5814. HUGHES *v.* ROWE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 714 F. 2d 150.

No. 83-5819. LEDGER *v.* JAGO, SUPERINTENDENT, LONDON CORRECTIONAL INSTITUTE. C. A. 6th Cir. Certiorari denied. Reported below: 716 F. 2d 903.

No. 83-5914. FRANK *v.* UNITED STATES OFFICE OF PERSONNEL MANAGEMENT. C. A. Fed. Cir. Certiorari denied. Reported below: 727 F. 2d 1117.

No. 83-5915. BROOKS *v.* CUNNINGHAM, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 742 F. 2d 1432.

No. 83-5923. LANSDOWN *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 226 Va. 204, 308 S. E. 2d 106.

No. 83-5930. VILLEGAS-ROJAS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 715 F. 2d 564.

No. 83-5962. ANDERSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 709 F. 2d 1305.

No. 83-5981. MICHELENA-OROVIO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 719 F. 2d 738.

No. 83-6056. FONNER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 723 F. 2d 914.

No. 83-6058. Gunter *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 725 F. 2d 671.

No. 83-6063. Bright et al. *v.* Blackburn, Warden, et al. C. A. 5th Cir. Certiorari denied. Reported below: 720 F. 2d 675.

No. 83-6076. Moss *v.* Arkansas. Sup. Ct. Ark. Certiorari denied. Reported below: 280 Ark. 27, 655 S. W. 2d 375.

No. 83-6101. Kinslow *v.* Kentucky. Ct. App. Ky. Certiorari denied. Reported below: 660 S. W. 2d 677.

No. 83-6106. Lannon *v.* Hogan, Commissioner of Corrections of Massachusetts, et al. C. A. 1st Cir. Certiorari denied. Reported below: 719 F. 2d 518.

No. 83-6107. Tyler *v.* Thompson, Governor of Illinois, et al. C. A. 7th Cir. Certiorari denied.

No. 83-6109. Ortiz *v.* Scully, Superintendent, Green Haven Correctional Facility. C. A. 2d Cir. Certiorari denied.

No. 83-6115. Griffin *v.* Little et al. C. A. 3d Cir. Certiorari denied. Reported below: 725 F. 2d 668.

No. 83-6116. Darden *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 83-6118. Soza et al. *v.* Town of Yreka City. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 83-6119. Williams *v.* Gupton, Superintendent, Wayne Correctional Center. C. A. 4th Cir. Certiorari denied. Reported below: 718 F. 2d 1094.

No. 83-6120. Mabery *v.* Presley et al. C. A. 4th Cir. Certiorari denied. Reported below: 716 F. 2d 896.

No. 83-6121. Nelson *v.* Willie, Warden, et al. C. A. 11th Cir. Certiorari denied. Reported below: 720 F. 2d 1292.

No. 83-6127. Tyler et al. *v.* Black et al. C. A. 8th Cir. Certiorari denied.

No. 83-6128. Ali *v.* Ponte, Superintendent, Massachusetts Correctional Institution. C. A. 1st Cir. Certiorari denied.

No. 83-6131. COOPER *v.* BLOUNT ET AL. Sup. Ct. Va. Certiorari denied.

No. 83-6134. FOREN *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 100 Wash. 2d 1027.

No. 83-6135. LONG *v.* MCKEEN, CHIEF OF INSTITUTIONS, OHIO DEPARTMENT OF REHABILITATION AND CORRECTIONS. C. A. 6th Cir. Certiorari denied. Reported below: 722 F. 2d 286.

No. 83-6140. BAKER *v.* MCKASKLE, ACTING DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Certiorari denied. Reported below: 715 F. 2d 1031.

No. 83-6144. WARD *v.* OWEN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 725 F. 2d 678.

No. 83-6149. MCCORKLE *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 438 So. 2d 771.

No. 83-6151. HILL *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 672 P. 2d 308.

No. 83-6152. CARTER *v.* TEXAS. C. A. 5th Cir. Certiorari denied.

No. 83-6154. DAVIDSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 725 F. 2d 685.

No. 83-6159. RAMIREZ *v.* ST. PAUL FIRE & MARINE INSURANCE CO. ET AL. Ct. App. La., 3d Cir. Certiorari denied. Reported below: 433 So. 2d 219.

No. 83-6160. WARNAS *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied.

No. 83-6162. MARK *v.* SHARAGA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 716 F. 2d 910.

No. 83-6164. MONTGOMERY *v.* AMERICAN EXPRESS CO. Ct. App. D. C. Certiorari denied.

No. 83-6165. WOODS *v.* SUMNER, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 722 F. 2d 749.

No. 83-6167. LEAHY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 722 F. 2d 748.

No. 83-6172. LEUSCHNER *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 56 Md. App. 725.

No. 83-6174. DUNLAP *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 83-6178. HARRIS *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 437 So. 2d 871.

No. 83-6179. HOWELL *v.* TRUMPOWER, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 725 F. 2d 675.

No. 83-6180. HOWELL *v.* DEWITT, SHERIFF. C. A. 4th Cir. Certiorari denied. Reported below: 725 F. 2d 675.

No. 83-6185. MCMINN *v.* WHITFIELD ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 723 F. 2d 910.

No. 83-6187. PLATEL *v.* MAGUIRE, VOORHIS & WELLS ET AL. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 436 So. 2d 303.

No. 83-6188. VEREEN *v.* NEWSOME, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 83-6191. HARRIS *v.* LEZAK, U. S. PROSECUTOR FOR THE DISTRICT OF OREGON. C. A. 9th Cir. Certiorari denied. Reported below: 722 F. 2d 745.

No. 83-6207. YOUNGERMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 719 F. 2d 941.

No. 83-6209. COHEN *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 727 F. 2d 1118.

No. 83-6222. EDWARDS *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 3d Cir. Certiorari denied. Reported below: 720 F. 2d 661.

No. 83-6236. SNIDER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 720 F. 2d 985.

No. 83-6240. LOVELACE *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 191 Conn. 545, 469 A. 2d 391.

No. 83-6244. CAMPBELL *v.* KELLEY, ATTORNEY GENERAL OF MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 724 F. 2d 41.

No. 83-6248. BOWRING *v.* MARRS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 723 F. 2d 900.

No. 83-6255. MOODY *v.* HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 5th Cir. Certiorari denied. Reported below: 719 F. 2d 403.

No. 83-6259. PLUNKETT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 83-6261. STREET *v.* UNITED STATES PAROLE COMMISSION. C. A. 6th Cir. Certiorari denied. Reported below: 723 F. 2d 911.

No. 83-6271. GUSTIN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 720 F. 2d 1527.

No. 83-6274. COTTON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 721 F. 2d 350.

No. 83-6278. FOSTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 82-1749. METROPOLITAN ATLANTA RAPID TRANSIT AUTHORITY *v.* KELLY. C. A. 11th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 698 F. 2d 1236.

No. 83-1082. ELROD, SHERIFF OF COOK COUNTY, ET AL. *v.* DURAN ET AL. C. A. 7th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 713 F. 2d 292.

No. 83-1160. MCAULIFFE ET AL. *v.* PENTHOUSE INTERNATIONAL LTD. C. A. 11th Cir. Motion of Charles H. Keating, Jr., et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 717 F. 2d 517.

No. 83-1166. SILVER ET AL. *v.* BENSON ET AL. Pa. Commw. Ct. Motions of United States Conference of Mayors et al. and Pennsylvania State Association of Township Supervisors et al. for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 74 Pa. Commw. 614, 460 A. 2d 904.

No. 83-1171. EXXON CORP. ET AL. *v.* INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA ET AL.; and

No. 83-1173. FEDERAL ENERGY REGULATORY COMMISSION *v.* INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA ET AL. C. A. D. C. Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 230 U. S. App. D. C. 197, 716 F. 2d 1.

No. 83-1200. National Association of Recycling Industries, Inc., et al. *v.* American Mail Line, Ltd., et al. C. A. 9th Cir. Certiorari denied. Justice O'Connor took no part in the consideration or decision of this petition. Reported below: 720 F. 2d 618.

No. 83-1230. Capitol Hill Dodge, Inc., et al. *v.* Chrysler Credit Corp. C. A. D. C. Cir. Motion of respondent for damages denied. Certiorari denied. Reported below: 230 U. S. App. D. C. 423, 717 F. 2d 1480.

No. 83-5965. Evans *v.* Texas. Ct. Crim. App. Tex.;
No. 83-6097. Coleman *v.* Virginia. Sup. Ct. Va.; and
No. 83-6136. Dillon *v.* Indiana. Sup. Ct. Ind. Certiorari denied. Reported below: No. 83-5965, 656 S. W. 2d 65; No. 83-6097, 226 Va. 31, 307 S. E. 2d 864; No. 83-6136, 454 N. E. 2d 845.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 83-6048. Williams *v.* Florida. Sup. Ct. Fla. Certiorari denied. Reported below: 438 So. 2d 781.

Justice Brennan, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentence in this case.

Justice Marshall, dissenting.

Petitioner was convicted of first-degree murder for the killing of a fellow inmate at the Florida State Prison. After the guilty verdict was rendered by the jury, the trial judge announced that the penalty phase of the trial would begin after a 2-hour lunch break. Petitioner's counsel moved for a continuance on the ground that he was "unable and unprepared to proceed." App. to Pet. for

Cert. E–4.[1] The trial judge stated that he would take the motion under advisement but that both parties should assume that the penalty phase of the trial would begin after the lunch break.

When the court reconvened, the judge denied petitioner's motion and immediately proceeded with the penalty hearing. Following the hearing, at which no witnesses were presented on petitioner's behalf, the jury recommended that the court impose the death penalty. After reading the results of a presentencing investigation, the judge adopted the jury's recommendation and sentenced petitioner to death.

The Florida Supreme Court, with two justices dissenting,[2] upheld the sentence, rejecting petitioner's claim that the trial court's denial of a continuance constituted an abuse of discretion. 438 So. 2d 781, 785–786 (1983). The Florida Supreme Court justified its decision by reference to the wide discretion accorded to trial judges in determining whether to grant continuances, defense counsel's awareness that this was a case in which the death penalty would be sought, and defense counsel's failure to offer reasons for his unpreparedness.

The trial court's refusal to grant petitioner a continuance makes a mockery of federal constitutional standards that have been designed to ensure heightened sensitivity to fairness and accuracy where imposition of the death penalty is at issue.[3] Neither the Florida Supreme Court nor the Florida Attorney General has offered any explanation why, in this *capital* case, commitment to scheduling was of such pressing concern as to justify the denial of even a brief continuance. This is not to excuse the unpreparedness of a defense counsel. But defense counsel's dereliction of professional duty could have been met with sanctions that did not deprive petitioner of an opportunity to show the judge and jury that mitigating circumstances rendered the death penalty inappropriate in his case.

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[1] Defense counsel explained as follows the reasons for his motion:

"Your Honor, the Defendant moves the Court to continue the penalty phase of the proceedings until a day subsequent to today in order to allow the Defendant an opportunity to prepare whatever mitigating circumstances might be appropriate to submit to the jury.

. . . . .

"This case has moved rather rapidly and has had some unusual circumstances to arrive and counsel is just unable and unprepared to proceed . . . ." App. to Pet. for Cert. E–4.

Replying to the prosecutor's suggestion that the penalty hearing proceed on schedule, petitioner's counsel repeated that "the Defendant has no witnesses and is not prepared to present any witnesses this afternoon . . . ." *Id.*, at E–5.

[2] Justice McDonald, in an opinion joined by Justice Overton, contended that petitioner's sentence should be vacated and a new sentencing proceeding ordered because "[i]t appears on the face of the record that Williams' trial counsel was totally unprepared for the sentencing proceedings and thus [that] Williams was not afforded his right of effective assistance of counsel at this critical proceeding." 438 So. 2d 781, 787 (1983).

The trial court's denial of a continuance represents an egregious instance of a judge penalizing a defendant in order to chasten his attorney.[4] Because of the trial judge's order, petitioner was subjected to a capital sentencing hearing for which defense counsel was, by his own admission, wholly unprepared. Petitioner was thus denied his federal constitutional right to effective assistance of counsel[5] at the point in the judicial process where he was most in need of it.

The State's sole response is that this Court is precluded from reviewing petitioner's Sixth Amendment claim because he failed to present it to the Florida Supreme Court. In the state court, petitioner apparently attacked the trial judge's ruling as an abuse of discretion, not as a deprivation of his constitutional rights. While it is true that, as a general matter, this Court will not review federal constitutional issues that have not been raised in state court, this rule is not absolute. When the record in a case has revealed plain error, this Court has enforced federal constitutional standards despite the petitioner's failure to raise clearly his federal constitutional claim in the court below. See, *e. g.*, *Vachon* v. *New Hampshire*, 414 U. S. 478 (1974) (reversing a criminal conviction on the basis of a due process claim neither made in constitutional form to the State Supreme Court nor presented by the appellant in his jurisdictional statement to this Court).

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[3] See *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) ("Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case") (plurality opinion); see also *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality opinion); *Gardner* v. *Florida*, 430 U. S. 349, 359 (1977) (plurality opinion); *id.*, at 363–364 (WHITE, J., concurring in judgment).

[4] Cf. *Morris* v. *Florida*, 393 U. S. 850 (1968) (a court should not vicariously punish an attorney's negligence by foreclosing a defendant's untimely appeal) (Black, J., dissenting).

[5] The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." The Court has long recognized that the right to assistance necessarily includes the right to "effective and substantial aid." *Powell* v. *Alabama*, 287 U. S. 45, 53 (1932). Hence, the Court has prohibited government conduct that would render ineffective an attorney's assistance to his client. See, *e. g.*, *Moore* v. *Illinois*, 434 U. S. 220 (1977); *Geders* v. *United States*, 425 U. S. 80 (1976); *United States* v. *Wade*, 388 U. S. 218 (1967). The Sixth Amendment right to effective assistance of counsel has been made applicable to the States through the Due Process Clause of the Fourteenth Amendment. See *Gideon* v. *Wainwright*, 372 U. S. 335 (1963).

My inability to countenance the deprivation of constitutional rights to which the petitioner was clearly subjected requires that I dissent from the Court's denial of certiorari.

No. 83–6129 (A–708). BOWLES ET AL. *v.* GEORGIA. Ct. App. Ga. Application for bail, presented to JUSTICE BRENNAN, and by him referred to the Court, denied. Certiorari denied. Reported below: 168 Ga. App. 763, 310 S. E. 2d 250.

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No. 81–1687. SONY CORPORATION OF AMERICA ET AL. *v.* UNIVERSAL CITY STUDIOS, INC., ET AL., 464 U. S. 417;

No. 82–1135. MCKASKLE, ACTING DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS *v.* WIGGINS, *ante*, p. 168;

No. 83–593. ELLSWORTH FREIGHT LINES, INC., ET AL. *v.* STATE TAX COMMISSION OF MISSOURI, *ante*, p. 1001; and

No. 83–5903. JONES *v.* UNITED STATES, *ante*, p. 1011. Petitions for rehearing denied.

MARCH 20, 1984

Certiorari Granted. (See No. 82–1401, *ante*, at 788.)

MARCH 23, 1984

Dismissal Under Rule 53

No. 83–1228. SCALA *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 2d Cir. Certiorari dismissed under this Court's Rule 53. Reported below: 742 F. 2d 1440.

REPORTER'S NOTE

The next page is purposely numbered 1301. The numbers between 1112 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* BLANKENSHIP ET AL.

ON APPLICATION FOR STAY

No. A–589. Decided January 26, 1984

An application to stay the District Court's order—which requires applicant Secretary of Health and Human Services to promulgate regulations imposing nationwide time limits for the adjudication and appeal of Social Security disability benefits claims—is granted pending the timely filing and subsequent disposition of a petition for a writ of certiorari to review the Court of Appeals' judgment affirming the District Court's order. At least four Justices would probably vote to grant certiorari here, since the Court has already granted the Secretary's petition for a writ of certiorari in another case involving judicial imposition of statewide time limits on the disability adjudication and appeal process. Furthermore, the balance of equities clearly weighs in favor of a stay, and prudence dictates that implementation of the District Court's order await this Court's decision in the case involving statewide time limits.

JUSTICE O'CONNOR, Circuit Justice.

Applicant, the Secretary of Health and Human Services (Secretary), requests that I issue a stay pending the filing and disposition of a petition for a writ of certiorari to review the *per curiam* judgment of the United States Court of Appeals for the Sixth Circuit in this case. The Court of Appeals' judgment, affirming an order entered by the District Court for the Western District of Kentucky, requires the Secretary: (1) to promulgate regulations adopting a *nationwide* 180-day time limit for the rendering of decisions in disability benefit cases under Titles II and XVI of the Social Security Act, and (2) to promulgate regulations imposing a *nationwide* 90-day time limit for the rendering of decisions in disability termination cases under Title XVI of that Act.

Although respondents requested only that the Secretary immediately be required to provide hearings and appeals to Kentucky class members, the Court of Appeals affirmed the District Court's order without limiting it in any way. The Secretary attests that the Solicitor General has determined that a petition for a writ of certiorari will be filed to seek review of this order. She further suggests that, in the meantime, it makes no sense to order her to impose nationwide time limits when this Court is about to address the propriety of a court's imposing such deadlines in even one *State* in *Heckler* v. *Day*, No. 82–1371 (argued December 5, 1983). Accordingly, she seeks a stay from this Court.

My obligation as a Circuit Justice in considering a stay application is "to determine whether four Justices would vote to grant certiorari, to balance the so-called 'stay equities,' and to give some consideration as to predicting the final outcome of the case in this Court." *Gregory-Portland Independent School District* v. *United States*, 448 U. S. 1342 (1980) (REHNQUIST, J., in chambers). These factors lead me to conclude that the request for a stay should be granted.

By granting the Secretary's petition for a writ of certiorari in *Day*, this Court has already determined that the question of judicial imposition of time limits on the disability adjudication and appeal process warrants review by this Court. The instant case presents issues of potentially even greater legal and social significance than does *Day*, because the court below has imposed on the Secretary the obligation to promulgate nationwide, as opposed to statewide, regulations. I think it is fair to say, therefore, that at least four Justices would vote to grant certiorari.

Furthermore, the balance of equities clearly weighs in favor of a stay. Imposition of nationwide time limits would, in all likelihood, require a substantial restructuring of the existing claims adjudication and appeals process. Respondents consist only of residents of Kentucky, and therefore have no standing to insist upon the imposition of deadlines for decisions on claims filed by residents of other States, as the courts below have ordered. Moreover, since the District Court's order had been stayed for almost 20 months prior to the Court of Appeals' decision, the extension of that stay for several more months until this Court decides *Day* should not cause significant incremental hardship to the interests respondents represent in Kentucky. The Secretary remains under her statutory duty to provide hearings and appeals within a reasonable period of time, and I must assume that she will abide by the statutory requirement and make all reasonable efforts to mitigate the hardships that members of the respondent class undoubtedly suffer pending resolution of their claims. But since imposition of time limits would necessarily require a period of transition, it is unlikely that immediate implementation of the District Court's order would produce benefits for claimants in Kentucky or elsewhere. The equities therefore counsel that the order be stayed until we render our decision in *Day*.

Finally, irrespective of the likelihood of success on the merits, it is clear that the Court's opinion in *Day* will provide guidance concerning the Secretary's duties in Kentucky and elsewhere. With the equities as they are, prudence dictates that implementation of the District Court's order await our decision in that case.

I therefore grant the requested stay of the District Court's order requiring the Secretary to promulgate regulations imposing time limits on the adjudication and appeal of disability claims pending the timely filing and subsequent disposition of a writ of certiorari in this case.

It is so ordered.

LILES ET AL. *v.* NEBRASKA ET AL.

ON APPLICATION FOR STAY

No. A-615. Decided February 13, 1984

An application for a stay, pending review by this Court, of a Nebraska District Court's contempt order committing applicants to jail is denied because of lack of jurisdiction under 28 U. S. C. § 2101(f), where, after the application was filed with the Circuit Justice, the Nebraska Supreme Court dismissed each applicant's appeal from the contempt order to that court "for lack of an appealable order."

JUSTICE BLACKMUN, Circuit Justice.

On January 31, 1984, Ralph Liles and others presented to me, as Circuit Justice, an application for a stay, pending review here, of an order of the District Court of Cass County, Nebraska, issued on December 14, 1983. That order committed the applicants to the Cass County jail for their refusal to answer certain questions when ordered to do so by the District Court. The Fifth Amendment claim made by the applicants did not appear to be insubstantial. At the time that the applicants submitted their application for a stay, each had an appeal from the contempt order pending before the Nebraska Supreme Court.

On February 7, respondents filed an opposition to the application for stay. On February 9, the Supreme Court of Nebraska entered an order in each applicant's case dismissing his appeal to that court "for lack of an appealable order."

With these cases in that posture, I have no jurisdiction to act pursuant to 28 U. S. C. § 2101(f). I therefore must deny the relief requested of me by the applicants. This, of course, is without prejudice to any further application, if necessary, if and when the cases return in a more favorable posture.

CLAIBORNE, UNITED STATES DISTRICT JUDGE *v.* UNITED STATES

ON APPLICATION FOR STAY

No. A-725. Decided March 12, 1984

An application by a Federal District Judge to stay federal criminal proceedings against him is denied, since four Justices of this Court probably would not vote to grant certiorari to review, at this stage of the litigation, the Court of Appeals' rejection of applicant's claims that a sitting federal judge may not be criminally prosecuted before being removed from office by impeachment, and that the prosecution against him was "vindictive" or "selective."

JUSTICE REHNQUIST, Circuit Justice

Harry Eugene Claiborne, the applicant, is a sitting United States Judge in the District Court for the District of Nevada. In December 1983, he was indicted for violations of 18 U. S. C. §201(c) and 18 U. S. C. §1343. His contentions that a sitting federal judge may not be criminally prosecuted before being removed from office by impeachment, and that the Government prosecuted him in order to punish him for decisions made as a federal judge, were rejected by the Court of Appeals for the Ninth Circuit. He requests that I stay the criminal proceedings against him, scheduled to commence today, in order that this Court may review these determinations.

The first contention—that a federal judge may not be indicted and tried for a criminal offense until he is first impeached and convicted by Congress—has been rejected not only by the Court of Appeals in this case but also by the only two other Courts of Appeals to consider the question. *United States* v. *Hastings*, 681 F. 2d 706 (CA5 1982); *United States* v. *Isaacs*, 493 F. 2d 1124 (CA7 1974). This Court denied certiorari in both *Hastings*, 459 U. S. 1203 (1983), and *Isaacs*, 417 U. S. 976 (1974).

Applicant's second claim appears to be a species of "vindictive" or "selective" prosecution, and the fact that he is a sitting federal judge does not seem to me to remove the claim from the principles most recently discussed in *United States* v. *Hollywood Motor Car Co.*, 458 U. S. 263 (1982). I think the Court of Appeals was correct in concluding that the denial of relief on this claim by the District Court was not immediately appealable under the "collateral order" doctrine.

Applicant finally contends that because the first of his claims was appealable under the collateral-order doctrine, the District Court lost jurisdiction to determine other pretrial matters pending resolution of the appeal by the Court of Appeals. The Court of Appeals applied the dual-jurisdiction approach set forth in *United States* v. *Dunbar*, 611 F. 2d 985 (CA5), cert. denied, 447 U. S. 926 (1980), and rejected this claim.

I do not believe that four Justices of this Court would vote to grant certiorari to review any one of these claims at the present stage of this litigation, and I therefore deny the application.

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rights action, "reasonable" fees are to be calculated according to prevailing market rates in relevant community, not according to cost of providing legal services, regardless of whether prevailing party is represented by private profitmaking attorneys or nonprofit legal aid organizations; where respondent prevailed in her action challenging certain procedures utilized for termination of Medicaid benefits, District Court—after concluding that hours expended and rates charged by her attorneys were reasonable—abused its discretion in awarding 50% "upward adjustment" in fee. Blum v. Stenson, p. 886.

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2. *Social Security Act—Spousal benefits—Sex discrimination.*—Equal protection principles are not violated by sex-based classification in Social Security Act provision creating exception from requirement that spousal benefits based on wage earner's retirement or disability be reduced by amount of Federal or State Government pension received by applicant, for spouses who were eligible to receive benefits prior to December 1982 and who would have qualified under pre-1977 law, which required that husbands and widowers (but not wives and widows) demonstrate dependency on their spouses; appellee, a nondependent husband seeking spousal benefits unreduced by his Government pension benefits, had standing to

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2. *Self-representation—Standby counsel.*—Where (1) respondent was permitted to proceed *pro se* at his state robbery trial, (2) trial court appointed standby counsel to assist him, and (3) he frequently changed his mind regarding standby counsel's role, respondent's Sixth Amendment right to conduct his own defense was not violated, since it appeared that he was allowed to make his own appearances as he saw fit and that standby counsel's unsolicited involvement was held within reasonable limits. McKaskle v. Wiggins, p. 168.

X. States' Immunity from Suit.

State officials' violation of state law—Federal-court action.—In a federal-court class action alleging that conditions at a state institution for mentally retarded violated class member patients' rights under a state statute, as well as their federal constitutional and statutory rights, Eleventh Amendment prohibited District Court from ordering state officials to conform their conduct to state law. Pennhurst State School and Hospital v. Halderman, p. 89.

CONTEMPT. See **Stays, 2.**

CORPORATE OFFICERS AS "PUBLIC OFFICIALS." See **Criminal Law.**

COUNTY COUNCIL ELECTIONS. See **Voting Rights Act of 1965.**

COURTS OF APPEALS. See **Jurisdiction.**

CRÈCHE IN CITY'S CHRISTMAS DISPLAY. See **Constitutional Law,** V.

CRIMINAL LAW. See also **Cheyenne River Act; Constitutional Law,** I; II; VII, 1; IX; **Habeas Corpus; Jurisdiction,** 2; **Stays,** 1.

Bribery—"Public officials"—Corporate officers administering federal grants to city.—Where a city that received federal grants under Housing and Community Development Act of 1974 for urban renewal programs designated a social service corporation to be city's subgrantee in charge of administration of federal grants, officers of such corporation who were responsible for expenditure of federal funds were "public officials" within meaning of 18 U. S. C. § 201(a) and thus were subject to prosecution under federal bribery statute. Dixson v. United States, p. 482.

CRUEL AND UNUSUAL PUNISHMENT. See **Constitutional Law,** I.

CUSTODIAL INTERROGATIONS. See **Constitutional Law,** VII, 1; IX, 1.

CUSTOMS SERVICE'S DETENTION OF PROPERTY. See **Federal Tort Claims Act.**

DEATH OF PLAINTIFF AS MOOTING CASE. See **Rehabilitation Act of 1973.**

DEATH PENALTY. See **Constitutional Law,** I; **Habeas Corpus.**

DEBTOR-IN-POSSESSION'S REJECTION OF COLLECTIVE-BARGAINING AGREEMENT. See **Bankruptcy.**

DEFAMATION. See **Constitutional Law,** III.

DISABILITY BENEFITS CLAIMS. See **Stays,** 3.

DISCLOSURE OF INFORMATION. See **Freedom of Information Act; Internal Revenue Code,** 3.

DISCRIMINATION AGAINST HANDICAPPED PERSONS. See **Rehabilitation Act of 1973.**

DISCRIMINATION AGAINST NONRESIDENTS OF CITY. See **Constitutional Law,** VIII.

DISCRIMINATION BASED ON SEX. See **Constitutional Law,** IV, 2; **Education Amendments of 1972; Jurisdiction,** 1.

DISCRIMINATION IN EDUCATION. See **Education Amendments of 1972.**

DISCRIMINATION IN EMPLOYMENT. See **Rehabilitation Act of 1973.**

DISCRIMINATION IN VOTING. See **Voting Rights Act of 1965.**

DISQUALIFICATION OF DEFENSE COUNSEL. See **Jurisdiction,** 2.

DISTRICT COURTS. See **Constitutional Law,** III, 1.

DIVERSITY JURISDICTION. See **Constitutional Law,** III, 1.

DOUBLE JEOPARDY. See **Constitutional Law,** II.

DUE PROCESS. See **Constitutional Law,** III.

EDUCATION AMENDMENTS OF 1972.

Sex discrimination in education—Federal financial assistance to college students—Coverage of college.—Although a private college accepted no direct federal assistance under Title IX of Amendments, which prohibits sex discrimination in any education program receiving federal financial assistance, its program for student financial assistance was covered by Title IX because some of its students received direct federal grants, and college's refusal to execute a proper program-specific Assurance of Compliance with Title IX's nondiscrimination provisions warranted termination of federal assistance to student financial aid program; requiring college to comply with Title IX as a condition for its continued participation in program infringed no First Amendment rights of college or its students. Grove City College v. Bell, p. 555.

EIGHTH AMENDMENT. See **Constitutional Law,** I.

ELECTIONS. See **Voting Rights Act of 1965.**

EMPLOYEES' REFUSAL TO OPERATE UNSAFE EQUIPMENT. See **National Labor Relations Act.**

EMPLOYER AND EMPLOYEES. See **Constitutional Law,** IV, 1; VI; **National Labor Relations Act; Rehabilitation Act of 1973.**

EMPLOYMENT DISCRIMINATION. See **Rehabilitation Act of 1973.**

EQUAL PROTECTION OF THE LAWS. See **Constitutional Law,** IV.

ESTABLISHMENT OF RELIGION. See **Constitutional Law,** V.

"EXECUTORY CONTRACTS" FOR PURPOSES OF BANKRUPTCY LAWS. See **Bankruptcy.**

FEDERAL APPROVAL OF STATE ELECTION LAWS. See **Voting Rights Act of 1965.**

FEDERAL GIFT TAXES. See **Internal Revenue Code,** 2.

FEDERAL INCOME TAXES. See **Internal Revenue Code,** 1.

FEDERAL JUDGES' CRIMINAL LIABILITY. See **Stays,** 1.

FEDERAL-STATE RELATIONS. See **Cheyenne River Act; Civil Rights Act of 1871; Constitutional Law,** X; **United States Arbitration Act; Voting Rights Act of 1965.**

FEDERAL TORT CLAIMS ACT.

Injury to property while in Customs Service's custody—Government's liability.—In petitioner's damages action against Government under Act to recover for alleged injury to his property while it was in Customs Service's custody, recovery was precluded by 28 U. S. C. § 2680(c), which exempts from Act's coverage any claim "arising in respect of" customs officer's detention of goods. Kosak v. United States, p. 848.

FIFTH AMENDMENT. See **Constitutional Law,** II; IV, 2; VII.

FINAL DECISIONS. See **Jurisdiction,** 2.

FINANCIAL ASSISTANCE TO COLLEGE STUDENTS. See **Education Amendments of 1972.**

FIREARMS. See **Constitutional Law,** II.

FIRST AMENDMENT. See **Constitutional Law,** III, 2; V; VI; **Education Amendments of 1972.**

FORFEITURE ACTIONS. See **Constitutional Law,** II.

FOURTEENTH AMENDMENT. See **Constitutional Law,** III; IV, 1; V; VI; VII, 1.

FRANCHISE AGREEMENTS. See **United States Arbitration Act.**

FREEDOM OF ASSOCIATION. See **Constitutional Law,** VI.

FREEDOM OF INFORMATION ACT.

Exemption 5—Airplane crash—Air Force investigation—Pilot's and airman's statements.—Confidential unsworn statements made, during Air Force's investigation of airplane crash, by pilot and airman who had rigged pilot's parachute equipment were protected from disclosure to respondent designers and manufacturers of plane's ejection equipment (who were being sued by pilot in a damages action) by Exemption 5 of Act. United States v. Weber Aircraft Corp., p. 792.

FREEDOM OF SPEECH. See **Constitutional Law,** VI.

GIFT TAXES. See **Internal Revenue Code,** 2.

GOVERNMENT EMPLOYEES. See **Constitutional Law,** IV, 1; VI.

GOVERNMENT'S LIABILITY FOR INJURY TO PROPERTY. See **Federal Tort Claims Act.**

GRAND JURY SUBPOENAS. See **Constitutional Law,** VII, 2.

HABEAS CORPUS.

State prisoner—Federal-court proceedings—Abuse of writ.—Where applicant state prisoner, who sought a stay of execution and review of denial of federal-court habeas corpus relief, had been unsuccessful in seeking relief in earlier federal habeas corpus and state postconviction proceedings, lower federal courts properly found that presentation of certain claims for

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first time in instant proceedings constituted abuse of writ of habeas corpus, and that ends of justice would not be served by reconsideration of claims previously presented on federal habeas. Antone v. Dugger, p. 200.

HANDICAPPED PERSONS. See **Rehabilitation Act of 1973.**

HOUSING AND COMMUNITY DEVELOPMENT ACT OF 1974. See **Criminal Law.**

IMMUNITY FROM PROSECUTION. See **Constitutional Law,** VII, 2.

IMMUNITY OF STATES FROM SUIT. See **Constitutional Law,** X.

INCRIMINATING STATEMENTS. See **Constitutional Law,** VII, 1; IX, 1.

INDIANS. See **Cheyenne River Act.**

INJUNCTIONS. See **Internal Revenue Code,** 1.

INSTITUTIONS FOR MENTALLY RETARDED. See **Constitutional Law,** X.

INTEREST ON STATE OBLIGATIONS. See **Internal Revenue Code,** 1.

INTERNAL REVENUE CODE.

1. *Exemption for interest on state obligations—Constitutionality of Code provisions—Effect of Anti-Injunction Act.*—Anti-Injunction Act does not bar South Carolina's action against Secretary of Treasury for injunctive relief on asserted ground of unconstitutionality of Code's provisions exempting from a taxpayer's gross income interest earned on a State's "registration-required obligations" only if they are issued in registered, rather than bearer, form; it is proper for this Court to exercise its discretion in favor of hearing case. South Carolina v. Regan, p. 367.

2. *Gift tax—Interest-free loans.*—Where a husband and wife made interest-free demand loans to their son and a closely held family corporation, loans resulted in taxable gifts, under §§ 2501(a)(1) and 2511(a) of Code, of reasonable value of use of money lent. Dickman v. Commissioner, p. 330.

3. *IRS summons—Accountant's workpapers—Accountant-client privilege.*—Where respondent certified public accountant firm, as independent auditor for respondent corporation, responsible for reviewing corporation's financial statements as required by federal securities laws, prepared tax accrual workpapers relating to corporation's contingent tax liabilities, such workpapers were relevant within meaning of § 7602 of Code (which authorizes Internal Revenue Service's issuance of a summons to examine records relevant to a tax inquiry), and were not protected from disclosure to IRS, which was conducting a criminal investigation of corporation's tax returns, on asserted ground of a work-product immunity under an accountant-client privilege. United States v. Arthur Young & Co., p. 805.

INTRA-AGENCY MEMORANDUMS. See **Freedom of Information Act.**

JOINT DEFENSE COUNSEL. See **Jurisdiction,** 2.

JUDGES' CRIMINAL LIABILITY. See **Stays,** 1.

JURISDICTION. See also **Cheyenne River Act; Constitutional Law,** III; **Internal Revenue Code,** 1; **Stays,** 2.

1. *Constitutionality of Social Security Act provision—Jurisdiction of appeal from District Court judgment.*—Where, in respondent's class action challenging constitutionality of Social Security Act provision requiring that gross income and deductions derived from a family business in community property States be attributed to husband unless wife established that she exercised substantially all of management and control of business, in which case all income was treated as wife's, District Court held provision unconstitutional and ordered certain relief for class, there was no right to direct review in this Court under 28 U. S. C. § 1252 since petitioner's appeal challenged only District Court's remedy, and thus Court of Appeals erred in dismissing appeal for lack of jurisdiction. Heckler v. Edwards, p. 870.

2. *Court of Appeals—District Court order disqualifying defense counsel.*—Where (1) petitioners were indicted by federal grand jury for civil rights violations, (2) they retained a law firm to act as joint counsel, (3) three of petitioners moved to sever their case from other petitioner's, and (4) District Court granted Government's motion to disqualify law firm from its multiple representation, disqualification order was not immediately appealable under 28 U. S. C. § 1291, and thus Court of Appeals had no jurisdiction to review order prior to entry of final judgment in case. Flanagan v. United States, p. 259.

LABOR UNIONS. See **Constitutional Law,** IV, 1; VI.

LIBEL. See **Constitutional Law,** III.

LOANS AS SUBJECT TO GIFT TAX. See **Internal Revenue Code,** 2.

MAGAZINE PUBLISHERS' LIABILITY FOR LIBEL. See **Constitutional Law,** III, 1.

MANUFACTURER'S CONSPIRACY WITH DISTRIBUTORS TO FIX PRICES. See **Antitrust Acts.**

MEDICAID BENEFITS. See **Civil Rights Attorney's Fees Awards Act of 1976.**

MENTAL INSTITUTIONS. See **Constitutional Law,** X.

"MINIMUM CONTACTS" FOR PURPOSES OF JURISDICTION. See **Constitutional Law,** III.

MINNESOTA. See **Constitutional Law,** IV, 1; VI.

MOOTNESS. See **Rehabilitation Act of 1973.**

MULTIPLE REPRESENTATION BY DEFENSE COUNSEL. See **Jurisdiction,** 2.

NATIONAL LABOR RELATIONS ACT. See also **Bankruptcy.**

Collective-bargaining agreement—Truckdriver's refusal to drive unsafe truck—"Concerted activity."—Where (1) a truckdriver employee of respondent was discharged when he refused to drive a truck that he believed was unsafe, (2) union declined to process his grievance under collective-bargaining agreement, which provided that agreement would not be violated if employees refused to operate unsafe equipment unless such refusal was unjustified, and (3) employee then filed an unfair labor practice charge against respondent, National Labor Relations Board reasonably concluded that employee's refusal to drive truck, even though he did not expressly refer to bargaining agreement, constituted "concerted activity" within meaning of § 7 of Act. NLRB v. City Disposal Systems, Inc., p. 822.

NATIONWIDE TIME LIMITS FOR PROCESSING SOCIAL SECURITY DISABILITY BENEFITS CLAIMS. See **Stays,** 3.

NATIVITY SCENE IN CITY'S CHRISTMAS DISPLAY. See **Constitutional Law,** V.

NONUNION PUBLIC EMPLOYEES' RIGHT TO MEET WITH EMPLOYER. See **Constitutional Law,** IV, 1; VI.

ORIGINAL JURISDICTION OF SUPREME COURT. See **Internal Revenue Code,** 1.

POLICE INTERROGATIONS. See **Constitutional Law,** IX, 1.

PRECLUSIVE EFFECT OF STATE-COURT JUDGMENT IN FEDERAL-COURT ACTION. See **Civil Rights Act of 1871.**

PRE-EMPTION OF STATE LAW BY FEDERAL LAW. See **United States Arbitration Act.**

PRICE FIXING. See **Antitrust Acts.**

PRIVILEGE AGAINST SELF-INCRIMINATION. See **Constitutional Law,** VII.

PRIVILEGED INFORMATION. See **Freedom of Information Act; Internal Revenue Code,** 3.

PRIVILEGES AND IMMUNITIES CLAUSE. See **Constitutional Law,** VIII.

PROBATION OFFICERS. See **Constitutional Law,** VII, 1.

PROPORTIONALITY OF PUNISHMENT. See **Constitutional Law,** I.

PRO SE DEFENDANTS. See **Constitutional Law,** IX, 2.

PUBLIC CONSTRUCTION PROJECTS. See **Constitutional Law,** VIII.

PUBLIC DISCLOSURE OF INFORMATION. See **Freedom of Information Act.**

PUBLIC EMPLOYEES. See **Constitutional Law,** IV, 1; VI.

"PUBLIC OFFICIAL" SUBJECT TO BRIBERY STATUTES. See **Criminal Law.**

RAILROAD EMPLOYEES. See **Rehabilitation Act of 1973.**

REGIONAL RAIL REORGANIZATION ACT. See **Rehabilitation Act of 1973.**

REHABILITATION ACT OF 1973.

Program receiving federal aid—Discrimination in employment—Injured railroad employee.—A suit may be maintained under Act—which proscribes discrimination against a handicapped person, solely because of his handicap, under any program or activity receiving federal financial assistance—by a railroad employee, who lost part of an arm because of an accident and who was thereafter refused employment allegedly because of his handicap, against petitioner (which was organized under a federal Act to acquire and operate insolvent railroads, and which was successor in interest of railroad that had employed plaintiff until accident occurred), even though petitioner received no federal aid for primary purpose of promoting employment; plaintiff's death after institution of suit did not moot case. Consolidated Rail Corporation v. Darrone, p. 624.

RELIGIOUS DISPLAY ERECTED BY CITY. See **Constitutional Law,** V.

RESIDENCY REQUIREMENTS. See **Constitutional Law,** VIII.

RES JUDICATA. See **Civil Rights Act of 1871; Constitutional Law,** II.

RETROACTIVITY OF DECISIONS. See **Constitutional Law,** IX, 1.

RIGHT OF ASSOCIATION. See **Constitutional Law,** VI.

RIGHT TO COUNSEL. See **Constitutional Law,** IX.

SECRETARY OF HEALTH AND HUMAN SERVICES. See **Stays,** 3.

SECURITIES REGULATION. See **Internal Revenue Code,** 3.

SELF-INCRIMINATION. See **Constitutional Law,** VII; IX, 1.

SELF-REPRESENTATION. See **Constitutional Law,** IX, 2.

SEX DISCRIMINATION. See **Constitutional Law,** IV, 2; **Education Amendments of 1972; Jurisdiction,** 1.

SHERMAN ACT. See **Antitrust Acts.**

"SINGLE PUBLICATION" RULE IN LIBEL ACTIONS. See **Constitutional Law,** III, 1.

SIXTH AMENDMENT. See **Constitutional Law,** IX, 2.

SOCIAL SECURITY ACT. See **Civil Rights Attorney's Fees Awards Act of 1976; Constitutional Law,** IV, 2; **Jurisdiction,** 1; **Stays,** 3.

SOCIAL SECURITY DISABILITY BENEFITS. See **Stays,** 3.

SOUTH CAROLINA. See **Voting Rights Act of 1965.**

SOUTH DAKOTA. See **Cheyenne River Act.**

SOVEREIGN IMMUNITY. See **Constitutional Law,** X.

SPOUSAL BENEFITS UNDER SOCIAL SECURITY ACT. See **Constitutional Law,** IV, 2.

STANDARD OF PROOF OF PRICE-FIXING CONSPIRACIES. See **Antitrust Acts.**

STANDBY COUNSEL'S ASSISTANCE OF PRO SE DEFENDANT. See **Constitutional Law,** IX, 2.

STANDING TO SUE. See **Constitutional Law,** IV, 2.

STATE-COURT JUDGMENT'S PRECLUSIVE EFFECT IN FEDERAL-COURT ACTION. See **Civil Rights Act of 1871.**

STATE-COURT JURISDICTION OVER INDIAN RESERVATIONS. See **Cheyenne River Act.**

STATE-COURT JURISDICTION OVER NONRESIDENTS IN LIBEL ACTIONS. See **Constitutional Law,** III, 2.

STATES' IMMUNITY FROM SUIT. See **Constitutional Law,** X.

STAYS. See also **Habeas Corpus.**

1. *Federal judge—Criminal liability.*—Application by a Federal District Judge to stay federal criminal proceedings against him is denied. Claiborne v. United States (REHNQUIST, J., in chambers), p. 1305.

2. *Jurisdiction of Circuit Justice.*—Application to stay state court's contempt order committing applicants to jail is denied because of Circuit Justice's lack of jurisdiction under 28 U. S. C. § 2101(f). Liles v. Nebraska (BLACKMUN, J., in chambers), p. 1304.

STAYS—Continued.

3. *Social Security disability benefits claims—Time limits.*—Application to stay District Court's order—requiring Secretary of Health and Human Services to promulgate regulations imposing nationwide time limits for processing Social Security disability benefits claims—is granted pending timely filing and disposition of a petition for certiorari to review Court of Appeals' judgment affirming District Court order. Heckler v. Blankenship (O'Connor, J., in chambers), p. 1301.

SUBPOENAS OF GRAND JURIES. See **Constitutional Law, VII, 2.**

SUMMONSES IN TAX INVESTIGATIONS. See **Internal Revenue Code, 3.**

SUPREMACY CLAUSE. See **United States Arbitration Act.**

SUPREME COURT. See also **Internal Revenue Code, 1; Jurisdiction, 1.**

Assignment of Justice Stewart (retired) to the United States Court of Appeals for the Sixth Circuit, p. 1074.

TAXES. See **Internal Revenue Code.**

TIME LIMITS FOR PROCESSING SOCIAL SECURITY DISABILITY BENEFITS CLAIMS. See **Stays, 3.**

UNFAIR LABOR PRACTICES. See **Bankruptcy; National Labor Relations Act.**

UNIONS. See **Constitutional Law, IV, 1; VI.**

UNITED STATES ARBITRATION ACT.

Franchise agreements—Enforcement of arbitration clause.—Act's provision creating right to enforce arbitration clauses in contracts involving interstate commerce applies in state courts as well as federal courts, and thus California statute requiring judicial consideration of claims under statute—such as appellee franchisees' claims that appellant franchisor of stores had violated statute's disclosure requirements—conflicted with federal Act and violated Supremacy Clause, and appellant could enforce arbitration clause in franchise agreements. Southland Corp. v. Keating, p. 1.

UNITED STATES' LIABILITY FOR INJURY TO PROPERTY. See **Federal Tort Claims Act.**

UNIVERSITIES. See **Constitutional Law, IV, 1; VI; Education Amendments of 1972.**

URBAN RENEWAL PROGRAMS. See **Criminal Law.**

VOTING RIGHTS ACT OF 1965.

County council elections—Validity of state statute—Federal approval of amendment of statute.—Where (1) a 1966 South Carolina statute changed form of Edgefield County's government, establishing a three-member

VOTING RIGHTS ACT OF 1965—Continued.

County Council and dividing county into residency districts for election purposes, (2) a 1971 amendment of statute, increasing number of residency districts and Council members to five, was submitted to Attorney General for federal approval pursuant to § 5 of Voting Rights Act, and (3) after requesting and receiving additional information (including a copy of 1966 statute), Attorney General stated that he did not object "to the change in question," such lack of objection to amendment cannot be deemed to have effect of ratifying changes embodied in 1966 statute. McCain v. Lybrand, p. 236.

WAIVER OF RIGHT TO COUNSEL. See **Constitutional Law,** IX, 1.

WHOLESALE DISTRIBUTORSHIPS. See **Antitrust Acts.**

WORDS AND PHRASES.

1. "*Concerted activities.*" § 7, National Labor Relations Act, 29 U. S. C. § 157. NLRB v. City Disposal Systems, Inc., p. 822.

2. "*Executory contract.*" § 365(a), Bankruptcy Code, 11 U. S. C. § 365(a) (1982 ed.). NLRB v. Bildisco & Bildisco, p. 513.

3. "*Final decisions of the district courts.*" 28 U. S. C. § 1291. Flanagan v. United States, p. 259.

4. "*Intra-agency memorandums or letters.*" Freedom of Information Act, 5 U. S. C. § 552(b)(5) (1982 ed.). United States v. Weber Aircraft Corp., p. 792.

5. "*Public official.*" 18 U. S. C. § 201(a). Dixson v. United States, p. 482.

6. "*Reasonable attorney's fee.*" Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988 (1976 ed., Supp. V). Blum v. Stenson, p. 886.

7. "*Transfer of property by gift.*" § 2501(a)(1), Internal Revenue Code of 1954, 26 U. S. C. § 2501(a)(1). Dickman v. Commissioner, p. 330.

WORK-PRODUCT DOCTRINE. See **Internal Revenue Code,** 3.